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WASHINGTON REPORTS

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IN THE

SUPREME COURT

OF

WASHINGTON

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OF THE

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ERRATA

Page 240, line 7 from top: for 7152 read 7251.

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 40

Page 125, line 5 from bottom: after *Sharpstein* insert (*Dudley G. Wooten*, of counsel),

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON.

[No. 5890. Decided December 13, 1905.]

LOIS E. COLEMAN, *an Insane Person, by R. Mines, Her Guardian, Respondent,* v. S. L. CRAVENS *et al., Appellants.*[1]

INSANE PERSONS — GUARDIAN — APPOINTMENT — AFFIDAVIT OF NONRESIDENCE. Under Laws 1903, p. 242, § 1, where a verified petition for the appointment of a guardian of a nonresident insane person states the residence of the ward, there is no necessity of an affidavit of nonresidence.

SAME—NOTICE OF APPLICATION. Under Laws 1903, p. 243, § 5, upon the appointment of a guardian for a nonresident insane person, personal service of notice upon the person having the custody of such person is not required, notice by publication being sufficient.

SAME—RIGHT TO APPLY. Under Laws 1903, p. 242, an application for the appointment of a guardian for an insane person can be made by any relative or friend.

SAME—SALE OF PROPERTY—STATUTES—CONSTRUCTION. Laws 1893, p. 85, being general in its nature and covering the entire subject of the estates of nonresident minors and insane persons, repeals by implication Hill's Code, §§ 3071-3078, providing that the guardian of such persons shall have no power to sell real estate; and consequently, under said act, § 6, and Laws 1893, p. 85, relating to private sales of such estates, a guardian of a nonresident insane person may be empowered by the court to sell the real estate belonging to such persons.

STATUTES—REPEAL. A repeal of a statute by implication is not covered by Const., art. 2, § 19, requiring the subject of the act to be expressed in its title.

[1]Reported in 82 Pac. 1005.

Appeal from a judgment of the superior court for King county, Frater, J., entered September 18, 1905, in favor of the plaintiff, upon overruling a demurrer to the complaint and the refusal of the defendants to plead over, in an action for specific performance. Affirmed.

Douglas, Lane & Douglas, for appellants.

Hastings & Stedman and *Sweeney & Steiner,* for respondent.

RUDKIN, J.—The plaintiff Mines, as guardian of the estate of Lois E. Coleman, an insane person, sold certain real property belonging to his ward, pursuant to an order of the superior court of King county, and the defendants became the purchasers at such sale. The sale was duly confirmed by the court, but the defendants refused to accept the title, pay the purchase money, or carry out the terms of sale. This action was brought to specifically enforce the contract of sale. The complaint set forth in detail all the proceedings relating to the appointment of the guardian, the sale of the property, the confirmation of the sale, the tender of a deed, and the refusal of the defendants to pay the purchase price. The defendants demurred to the complaint on several of the statutory grounds, but the demurrer was overruled. The defendants elected to stand on their demurrer and refused to plead further. Judgment went against them according to the prayer of the complaint, and from such judgment this appeal is prosecuted.

The first objection urged by the appellants is that the notice of the application for the appointment of a guardian was insufficient, for the reason that no affidavit of nonresidence was filed. The statute provides that, upon the presentation of a petition, the court shall cause notice to be served on the insane person and on the person having the care, custody, and control of such insane person. Laws 1903, p. 242, § 1. The verified petition should set forth the resi-

dence of the insane person so that the court may cause the proper notice to be given. That was done in this case, the petition was duly verified, and the necessity for filing a second affidavit setting forth the same facts is not apparent. The second objection is that no notice was served on the person having the care, custody, and control of the insane person, as required by § 2 of the above act. This application falls under § 5 of said act, and the notice by publication is manifestly the only notice required in such cases. The third objection is that the petitioner was not authorized by law to make application for letters of guardianship. Section 1 of the act provides that the application may be made "upon verified petition of any relative or friend" of the insane person. The petition in this case avers that,

"Your petitioner is a citizen and resident of King county, state of Washington, and was the agent and friend of said Lois E. Coleman before she was adjudged insane; that your petitioner has been requested by the sons of said Lois E. Coleman, and also by the person and agent who has the charge and management of her affairs in California, to petition for and make application to be appointed, and to act as guardian of the estate of said Lois E. Coleman within the state of Washington."

This brings the petitioner clearly within the provisions of the statute.

The fourth and last objection is that the court had no jurisdiction to order the sale of real property belonging to a nonresident insane person. The statutes governing this question are by no means free from doubt and ambiguity. Prior to the legislative session of 1893, real property of a nonresident minor or insane person could only be sold on application of the foreign guardian. 1 Hill's Code, § 3070. Subsequent sections of the same statute authorize the appointment of a trustee to manage, lease, and care for the property of nonresident minors and insane persons, on application of the foreign guardian; but § 3076 provided as follows:

"The said trustee shall have no power to apply to the superior court for the sale of the real estate of such minor or person of unsound mind."

An act was approved March 11, 1893, entitled,

"An act concerning insane persons and persons *non compos mentis,* residing out of the state of Washington; prescribing a mode of procedure for the control and management of the estates and property of such persons, and the payment of their debts, and declaring an emergency." Laws 1893, p. 286.

The first, second, third, fourth, and fifth sections of said act clearly authorize the appointment of a domestic guardian for the separate property of a nonresident minor or insane person. The sixth and seventh sections seem to relate almost exclusively to property in which the minor or insane person has a community interest, and to authorize the sale thereof. The latter part of section 6, however, contains the following provision:

"And the guardian shall, upon application to the court for that purpose, be authorized to sell or mortgage the estate or interest of the said insane person or person *non compos mentis,* for the purpose of paying the debt or providing for the support or maintenance of such ward or the wife of such ward or for the better investment of the proceeds of such estate."

In view of the general title of the act, and the general language contained in the first five sections, we are constrained to hold that the provision just quoted authorizes the sale of the separate property of minors and insane persons for the purpose of paying their debts, providing for their support and maintenance, and for the better investment of the proceeds. The tenth section of the act repeals §§ 3071 to 3078, inclusive, of Hill's Code, *supra.* It is claimed by the appellants that such repealing clause is void, because the subject of the act is not expressed in the title, as required by art. 2, § 19, of the state constitution. This is, no doubt, true, as far as any express repeal is concerned. But the act

is general in its nature, covers the entire subject of the property of nonresident minors and insane persons, and repeals by implication all laws necessarily in conflict therewith. Such repeals are not covered by the constitutional provision in question. We are therefore of opinion that the above act and the act of March 8, 1893 (Laws 1893, p. 85), relating to private sales of real property belonging to the estates of decedents, minors and insane persons, empowered the court to order the sale in question.

No other objections appearing against the validity of the sale, the judgment of the court below is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5904. Decided December 15, 1905.]

J. W. PLUMMER *et al.*, *Appellants*, v. GEORGE ILSE, *Respondent*.[1]

MORTGAGES—ABSOLUTE DEED AS A MORTGAGE—ESCROW—DELIVERY UPON DEFAULT—CUTTING OFF EQUITY OF REDEMPTION. Where money was borrowed for the purpose of paying a balance due on the purchase price of premises, and a note and mortgage on the property was then given to the lender, and as part of the same transaction a deed was made to the lender and placed in escrow under an agreement that the same should be delivered in case the note was not paid when due, the deed must be held to be a mortgage although the evidence tends to show that the parties intended otherwise; since it was such in its inception, the relation of debtor and creditor existed, and the equity of redemption cannot be cut off by such an agreement as part of an original transaction between parties under no previous contractual relation.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 21, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to reform a deed as a mortgage and for redemption. Reversed.

[1]Reported in 82 Pac. 1009.

L. H. Prather, for appellants.

Peacock, Wells & Ludden, for respondent.

Crow, J. — This action was commenced by appellants, J. W. Plummer and Amanda Scofield, against respondent, George Ilse, for the purpose of having a certain warranty deed adjudged to be a mortgage, and for the purpose of making redemption. From a judgment of dismissal, this appeal has been taken.

No statement of facts has been certified, but this appeal is prosecuted on findings made by the trial judge, which appellants contend do not support the final judgment, but authorize a decree in their favor. It is not necessary to copy such findings at length in this opinion. From them it appears that, on May 2, 1904, appellant Amanda Scofield being indebted for $500, balance of purchase money then due on section 13, township 39, north of range 42 east, W. M., in Spokane county, she and appellant J. W. Plummer borrowed of respondent George Ilse said sum of $500 to pay the same, and executed and delivered to respondent their promissory note of that date for said sum, payable in six months, with interest from date at the rate of one per cent per month; that, to secure the payment of said note, appellants executed and delivered to respondent their certain mortgage deed, of even date therewith, the same being in ordinary form, and containing conditions for foreclosure and sale for nonpayment and for the application of the proceeds of such sale to the discharge of the indebtedness arising on said note, and to disbursements and costs including an attorney's fee of $100; that, at the time of the execution and delivery of said note and mortgage, appellants also made and executed their certain warranty deed for said land to respondent, and placed the same in escrow with one J. W. Graves, agent of appellants and also of respondent, with instructions that, in the event appellants should make default on said note according to the conditions of said note and

mortgage, said deed was to be delivered to respondent in full payment and satisfaction, to save appellants from further costs and attorneys' fees on foreclosure, it being understood that respondent should accept said deed; that, after the execution of said note and mortgage, said J. W. Graves, who acted as agent for all the parties in negotiating said loan, informed appellants that respondent would not make said loan unless appellants would also execute said deed and deliver the same to said Graves; that thereupon said note, mortgage and deed were delivered to said Graves, who forthwith paid to appellants said $500, borrowed from respondent; that at the time of said delivery of said instruments to said Graves, he, the said Graves, signed and delivered to appellants a written instrument reading as follows: "I hereby agree to hold the deed until the note and mortgage shall become due and past due and then the deed shall be delivered to the mortgagee;" that appellants made default on said note when the same became due; that said deed was then delivered to and accepted by respondent, in full satisfaction of said note and mortgage, and of all costs, attorney's fees, and charges due respondent; that, at the time of the delivery of said deed, respondent delivered to said Graves a release of said mortgage, together with said mortgage and the note thereby secured; that, prior to the delivery of said deed, said Graves informed appellants that, unless said mortgage was promptly paid when due, he would be compelled to deliver said deed to respondent, who had also informed appellants that said $500 and interest would have to be promptly paid when due; that said deed was not at any time in the possession of respondent until delivered by said Graves after the maturity of said note; that said deed was placed in escrow with said Graves, with full knowledge and understanding by appellants that the same was an absolute warranty deed, and that the same should be delivered to respondent on default in payment, and would convey a fee simple title; that re-

spondent received said deed in full settlement and satisfaction of said note and mortgage, and of all costs, charges, interest, taxes, and attorney's fees, and is now the owner of said real estate in fee simple; that on November 14, 1904, appellant Plummer, for himself and for said appellant Scofield, went to respondent's place of business for the purpose of paying said loan, and with sufficient money to pay the same, but respondent was absent therefrom, and appellant could not then make any tender, and that on said November 14, 1904, respondent, claiming said deed to be an absolute conveyance, placed the same of record. Other facts were found, but we have stated all that are material to the determination of the only question involved, viz., whether said deed was a mortgage or an absolute conveyance of the fee simple title.

The first question to be determined is, What relations existed between appellants and respondent, at the date of the completion of the original transaction, and as the result thereof? It appears that the giving of the note and mortgage, and the execution of the deed, and the placing of the deed in escrow, were one transaction. There is no question but that an interest-bearing loan was then made, and that the relation of debtor and creditor and also mortgagor and mortgagee then existed between the parties, and continued to exist for the period of at least six months thereafter. True, the deed absolute in form was executed and placed in escrow, but we do not think this changed the relation of the parties from that of mortgagor and mortgagee to that of vendor and vendee. The deed must be construed to have been, at the time of its execution, either a mortgage or a conveyance making a conditional sale, according to all the surrounding facts and circumstances, as they then existed. In deciding whether it was a mortgage, the principal test to be applied is, whether the relation of the parties towards each other of debtor and creditor continued after the execution of the deed. 20 Am. & Eng. Ency. Law (2d ed.), 940. In *McNamara v. Culver*,

22 Kan. 661, the court, speaking through Brewer, J., now a member of the supreme court of the United States, said:

"The test is the existence or nonexistence of a debt. And equity looks behind the form to the fact. If the transaction was intended as a loan, if there remains a debt for which the conveyance is only a security, and the collection of which may be enforced independent of the security, equity will hold it a mortgage, no matter whether the transaction is evidenced by one or two instruments."

Applying this test, the deed executed by appellants must be held to have been a mortgage. Did it at any subsequent time cease to be a mortgage and become an absolute conveyance of the fee simple title? "Once a mortgage, always a mortgage," is a well-established rule in equity. A deed intended as a mortgage will remain a mortgage until the equity of redemption is cut off, and the parties cannot by stipulation, however express or positive, render it anything else. 4 Current Law, 683; Pingrey, Mortgages, § 87; 1 Jones, Mortgages (6th ed.), § 340.

"The doctrine has been firmly established from an early day that when the character of a mortgage has attached at the commencement of the transaction, so that the instrument, whatever be its form, is regarded in equity as a mortgage, that character of mortgage must and will always continue. If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby to redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right." Pomeroy, Equity Jurisprudence (2d ed.), § 1193.

It appears that appellants owed to others not parties here some unpaid purchase money, and that they desired to, and did, effect a loan to pay the same; that respondent, as a condition for making such loan and taking their note and mortgage, at the time insisted on the deed being placed in escrow. If he did not make a loan, but was purchasing the real estate, why did he take the note and mortgage? The only possible answer is that it was his intention to take a note and mortgage as evidence of, and security for, the loan, and at the same time, and as a part of the same transaction, to enter into some simultaneous agreement that would have the effect of destroying or cutting off the mortgagor's equitable right of redemption. In 2 Washburn, Real Property (6th ed.), § 998, the text reads as follows:

"If the transaction between the parties be in fact a mortgage, its character cannot be affected or changed by any agreement entered into at the time between them as to redemption or the other incidents of a mortgage. The right of redemption attaches as an inseparable incident created by law, and cannot be waived by agreement. A mortgage, moreover, depends for its vitality upon the law in force at the time of its execution. The doctrine universally applicable is, if once a mortgage, always a mortgage. Nor can it be made otherwise by any agreement of the parties made at the time of the execution of the deed, nor upon any contingency whatever. Equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan."

Equity regards it as impossible for contracting parties, in a single transaction, by the execution of one or more written instruments to create the relation of debtor and creditor or mortgagor and mortgagee, and at the same time to provide for a conditional sale, or the destruction of the mortgagor's right to redeem after default. The deed having been a mortgage in its inception, appellants are still possessed of their equitable right to redeem, unless such right has been termi-

nated either by foreclosure or some subsequent and independent valid agreement between the parties, neither of which has occurred.

Respondent contends that the findings of the trial court show the deed was not a mortgage, but was intended by the parties to become absolute in the event of nonpayment of the debt, and contends that such finding sustains the final judgment herein. It is true that substantially such a finding was made, but we think it can have no controlling effect here, for the reasons (1) that it is more in the nature of a conclusion of law than a finding of fact; and (2) that, even though it be a finding of fact, it is inconsistent with other facts necessarily found, from the nature and terms of the several instruments executed. In 2 Washburn, Real Property (6th ed.), § 990, the author uses the following language:

"On the other hand, if the transaction of the parties actually constitutes a mortgage in terms, it will have that effect, though not so intended by them when it was done. Thus, where one made a deed, and the grantee gave back a bond to reconvey on certain conditions, it was held that, though not intended thereby to create a mortgage, it was one in fact."

Where the transactions actually occurring between the parties are clearly of such a nature as to show a deed absolute in form to have been a mortgage, courts of equity will construe it as such, even though the parties may have apparently intended otherwise. The reason of this rule is that courts of equity are ever zealous to preserve to a mortgagor his equitable right of redemption, and to prevent him from entering into any agreement at the time of the execution of the original mortgage having the effect of nullifying such right. If the mortgage exists, the equity of redemption necessarily exists as incidental thereto. Therefore, in passing upon the facts found, we must, in applying these equitable principles, hold the deed to have been a mortgage, although there may have been some seeming intention on the part of

one or both of the contracting parties that it should be otherwise considered.

Respondent has cited a number of authorities to support his contention that the deed was in fact an absolute conveyance; but in all of his citations it appears from the facts involved either (1) that, at the time of the execution of the deed, a previous contractual relation of mortgagor and mortgagee, or creditor and debtor, antedating the deed, had existed between the parties and was then terminated; or (2) that, at the time of the execution of the deed, no loan was made by the grantee to the grantor, nor did the relation of debtor and creditor arise between them. The case at bar does not comply with either of these conditions, and we have been unable to find any authority which would justify us in holding the deed here given as a part of the original transaction to be other than a mortgage; nor have counsel cited us to any authority which would warrant such holding.

The honorable trial court erred in holding the deed to have been an absolute conveyance. The judgment is reversed, and the cause remanded with instructions to enter a decree adjudging the deed to be a mortgage. Further proceedings will also be taken by the superior court for the purpose of ascertaining the amount due upon said mortgage, and necessary to be paid by appellants on redemption.

MOUNT, C. J., ROOT, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5758. Decided December 18, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN BUSH *et al., Appellants.*[1]

APPEAL—RECORD—REVIEW. Error in rulings on motions for a continuance and new trial in a criminal case, or discretionary matters on sentence, cannot be reviewed on appeal in the absence of a bill of exceptions or statement of facts.

CRIMINAL LAW—APPEAL—REVIEW—WAIVER OF ERROR. Error cannot be assigned on the failure to appoint counsel for accused upon their arraignment, where they were then informed of their right to counsel and stated that they did not desire any.

CRIMINAL LAW—SEPARATE TRIALS—DEMAND—WAIVER. After the jury has been called, it is too late to demand, as a matter of right, separate trials of defendants jointly charged.

CRIMINAL LAW—PUNISHMENT—THIRD CONVICTION. Under Laws 1903, p. 126, § 3, one who is charged and found guilty of having been twice before convicted of felonies and sentenced therefor, must on the third conviction, be punished by life imprisonment.

Appeal from judgments of the superior court for King county, Griffin, J., entered March 11, and March 25, 1905, upon the trial and conviction of the defendants, jointly, of the crime of robbery. Affirmed.

Casey & Casey, for appellants.

Kenneth Mackintosh and *John F. Miller*, for respondent.

MOUNT, C. J.—Appellants were convicted upon an information charging them jointly with the crime of robbery. Both have appealed, each filing separate briefs upon the appeal. Appellant Bush alleges errors as follows:

"(1) The court erred in failing to advise defendant of his rights, and in particular his right to have counsel, and in failing to appoint counsel to represent him, or at the time he was arraigned. (2) The court erred in refusing the defendant John Bush a separate trial. (3) The court erred in rendering its judgment and sentencing the defendant John Bush to ten years in the state penitentiary at hard labor."

[1]Reported in 82 Pac. 1024.

Appellant LeRoy alleges the first two errors the same as appellant Bush, as stated above, and in addition thereto that the court erred in refusing a continuance of the trial, and denying his motion for a new trial, and in sentencing him to life imprisonment.

There is no statement of facts in the case. The whole record brought here upon this appeal consists of copies of the information, judgments, and journal entries of the clerk made in the progress of the case. There is nothing, therefore, upon which we may review the rulings of the lower court, upon the assignments of error relating to the continuance of the trial, or to the motion for a new trial, or the sentence of either of the appellants, except as hereinafter stated, because these questions depend upon the facts and rest somewhat in the discretion of the trial court. The record before us shows that, at the time the defendants were arraigned upon the charge of robbery, they were informed of their right to have counsel, and they both stated that they did not desire the court to appoint counsel for them. There is, therefore, no merit in the first assignment of error.

The record also shows that, at the time the defendants entered their pleas of not guilty and when the case was set down for trial, which was more than two weeks after the arraignment, no demand was made for separate trials, and that such demand was not made until after the jury had been called into the box to try the case. It was too late at that time to demand separate trials as a matter of right. In *State v. Mason,* 19 Wash. 94, 52 Pac. 525, in construing Bal. Code, § 6949, relating to separate trials, this court said:

"The right to a separate trial is a valuable one, and this section of the penal code confers it upon a defendant. It does not specify when the demand shall be deemed waived. We think this right to a separate trial belongs to the defendant, and he may avail himself of the right at the time the cause is assigned for trial. A severance of trial afterwards is in the discretion of the court until the jury is sworn

to try the cause, subsequently to which time a several trial cannot be granted."

The appellant LeRoy is charged in the information with having twice before been convicted of felonies and sentenced therefor, and the jury so found by their verdict. It was the duty of the court, therefore, to sentence him to the penitentiary for life, under § 3, Laws 1903, page 126. Appellant does not attack the facts, or the validity of the statute. His only comment upon this point is:

"The defendant is charged with the crime of robbery. Bal. Code, § 7103, provides a penalty for robbery, of from one to twenty years, *not more than twenty years.* The defendant gets a sentence for life. No comment or argument is necessary."

We find no merit in the appeal, and the judgments appealed from are therefore affirmed.

CROW, DUNBAR, RUDKIN, FULLERTON, HADLEY, and ROOT, JJ., concur.

[No. 5691. Decided December 18, 1905.]

THE CITY OF NORTH YAKIMA, *Respondent,* v. HENRY B. SCUDDER *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS. A lien for a municipal assessment for local improvements is not rendered void by reason of mere irregularities.

APPEAL—REVIEW—ESTOPPEL. An ordinance offered in evidence and excluded at appellant's instance cannot be considered on appeal.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—RESOLUTION OF INTENTION—CHANGES AND REPUBLICATION TO CORRECT INACCURACIES—SUFFICIENCY—STATUTE. A statute requiring the city counsel to first publish notice of its intention to make a local improvement, stating the name of the street to be improved and an estimate of the cost, is substantially complied with so that there is no jurisdictional defect, where the required resolution and ordinance were passed before

[1]Reported in 82 Pac. 1022.

the improvement was commenced, and the proceeding is not affected by the fact that, owing to a miscalculation or mistake, the original date for hearing was changed by the clerk by direction of the council before publication, and a second publication of the ordinance was had for the purpose of correcting an error, the resolution having specified the improvements and misleading no one, and when, by reference to the records, all necessary information could have been obtained.

SAME—FAILURE TO SHOW ESTIMATED COST—ESTIMATE ON FILE—SUFFICIENCY. A municipal assessment for local improvements is not invalidated by reason of the fact that the notice, which was required to state an estimate of the cost, left the amount blank, since the property owners were thereby put on inquiry and from the estimate on file could have ascertained the amount.

SAME—PUBLICATION—OFFICIAL PAPER. An objection that notice of a municipal assessment for local improvements was not published in the official paper is unavailing where the paper had been designated as the official paper for a certain term, which had expired without the designation of any other official paper, since it was the *de facto* official paper for the purposes of the publication.

SAME—LETTING CONTRACT—ACT OF CITY COUNCIL—CONCLUSIVENESS. The objection that in letting a contract for a local improvement, the city council did not act to the best advantage, does not raise a jurisdictional question, but goes only to the discretion of the council, which will not be reviewed except for fraud or collusion.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered August 2, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, foreclosing a local improvement assessment lien. Affirmed.

Henry J. Snively, for appellants.

Ira P. Englehart, James O. Cull and *C. E. Forsyth,* for respondent.

DUNBAR, J.—This is an appeal from a judgment foreclosing a lien for the improvement of Second street in the city of North Yakima. Many of the assignments of error involve mere irregularities which, if conceded, would not render the assessment void, under the rule announced in *Tumwater v. Pix,* 18 Wash. 153, 51 Pac. 353, and many subsequent cases.

So that we feel it incumbent upon us to discuss here only those alleged actions and omissions which go to the jurisdiction of the city officers to make the improvements and levy the assessment, and as to those questions, it seems to us that the objections raised to the jurisdiction are more technical than meritorious. As to the argument of appellants in relation to the differences between ordinances 327 and 331, it appears that ordinance 331 was not received in evidence, but was excluded on appellants' objection. Hence, this court cannot take cognizance of it.

The statute upon which the jurisdiction of the city council to make the improvement and levy the assessment must rest (Pierce's Code, § 3495) provides that,

"The city council shall, before or during the grading, paving or other improvement of any street or alley, the cost of which is to be levied and assessed upon the property benefited, first pass a resolution or ordinance declaring its intention to make such improvement and stating in such resolution or ordinance the name of the street or alley to be improved, the points between which the said improvement is made, and the estimate of the cost of the same, and the cost of the same is to be assessed against the property abutting (and included in the assessment district herein provided) on such street proposed to be improved, and shall fix a time not less than ten days in which protests against such proposed improvement may be filed in the office of the city clerk. It shall be the duty of such clerk to cause such resolution to be published in the official newspaper of the city in at least two consecutive issues before the time fixed in such resolution for filing such protest, ..."

The statute seems to be a little inconsistent, in that it provides that the council shall, "before or during the improvement," first pass a resolution declaring its intention to make such improvement; but, placing the construction on the statute which requires the resolution to be passed before the improvement commences, we think the record shows that there was at least an honest attempt on the part of the council

to comply with the mandatory provisions of the statute. The required resolution of intention and the ordinance were passed, and the publication was made, and the testimony of the clerk shows that there was really but one ordinance passed. The ordinance describes the street to be improved, so that there could not be intelligent doubt in the mind of any one desiring to be informed as to its location and the location of the lots subject to the assessment. The difference in the time specified in the original resolution, or the resolution which was really passed, and that in the resolution which was published, is accounted for by the testimony of the clerk, which is as follows:

"Q. Just look at this paper. What is it Mr. Doust? A. Resolution of intention about curbing, guttering and macadamizing Second street between certain points. Q. What is this interlineation here? What does it mean? A. Why, this was because—it had reference, if I remember right, and I think I am positive in it—that at the time this was issued the official paper at that time doing the printing could not take care of this, so the time was extended over for the publication, and the time for protest. Q. In this resolution it says 'to appear on the 2nd day of June, 1902,' originally. This date was put in by whom? A. By myself. Q. Who asked you to change the notice? A. It was done in the council by my stating to them that it was impossible for them to get it in until that date, so that the protest could go in of that date and give them sufficient time to publish it. Q. They changed the date themselves? A. They changed the date. Q. Were they in regular session? A. They were in regular session, and I drew their attention to the fact that we could not get it in on that date according to the typewritten copy. Q. It was published on the 16th under the direction of the council? A. Yes, sir."

A like explanation by the same witness was made as to the publication of the alleged second ordinance.

"Q. Now, the ordinance that was changed; was this ordinance published by you? A. Yes, sir. Q. There is an ordinance relative to the improving of Second street known as

ordinance No. 327. That is, an ordinance published known as Ordinance No. 327; and also an ordnanice known as No. 331, both relating to the improving of Second street. Why was the second ordinance printed? A. Because the original ordinance giving the improvement district number gave the number wrong; there had been an improvement district advertised of that number, and we had to re-publish to get the proper improvement district on the list in the rotation. Q. So that you re-pulished the ordinance which was originally published? A. It was supposed to be. Q. You went to work and published that for the purpose of correcting it? A. For correcting the error in the number of the district. Q. But the ordinance passed was No. 327? A. 327 was the original. The Court. The ordinances are the same in all respects? A. Except in the first ordinance it is designated as improvement district No. 33 and in the second ordinance designated as improvement district No. 35. Q. As a matter of fact, were two ordinances passed? A. No, sir; the records show one. The first ordinance was the only ordinance passed in the council."

So that it plainly appears that there was but one ordinance passed, and while it is true that the changes were made upon the suggestion of the clerk, they were actually made by order of the council. It seems to us that the jurisdictional requirements were substantially complied with, and the informalities or seeming irregularities could in no wise mislead any one who took notice of what was actually published and which purported to be notice to the owners of the lots affected by the ordinance; and a substantial compliance with the law is all that will be required. Members of city councils are not presumed to be technical lawyers or trained parliamentarians. They transact the business of the city in a plain, straightforward way, and courts will not examine their proceedings with that nicety of discrimination in which they indulge in passing upon the proceedings of courts of record, which are presumptively presided over by men learned in the law and capable of detecting technical flaws which must necessarily escape the notice of minds not trained in that

particular. For it is manifest that, if city councils were held to such technical requirements, very little could be legally accomplished by them; the necessary improvement and progress of cities would be impeded; and the ends and aims of the law defeated.

An examination of the case of *Buckley v. Tacoma,* 9 Wash. 253, 37 Pac. 441, upon which appellants so confidently rely, convinces us that that case is not in point. It was decided upon the theory that certain provisions of the charter of the city of Tacoma which confer jurisdiction had not been complied with, and that no resolution which the charter provided for had been passed ordering the improvement or defining the work to be done. So that, that which was contemplated could not be ascertained by any engineer, and there had been no estimate made of the same. This was probably an extreme case, but reference thereto shows conclusively that it was based upon omissions of jurisdictional requisites which are not involved in this case. Here the resolution was published, the improvements were fully specified, and by reference to the plans, specifications and details then on file in the office of the city clerk, all necessary information could have been obtained.

It is also contended that there was no publication of the resolution, within the contemplation of the statute, because the estimate of the improvements was not incorporated but was left blank, the published resolution in that respect appearing as follows, "That the estimated cost of said improvement is $——." This was so apparently a clerical error that it must have been so understood by any one reading the resolution, for the presumption could not be indulged that the improvement would not cost anything. The form in which it was published affirmatively shows that it would cost *some* number of dollars, but that the number of dollars was left blank. The property owner was thus given notice that, if he was interested in the amount of the estimate, he must inquire further. He knew that the original resolution

would be on file subject to inspection, and that an estimate would also have to be made, which was also on file. The means were at hand for supplying the defect in the notice, and if he did not avail himself of such means, after being put upon inquiry, he cannot complain of want of knowledge and will not be held to be injured.

"The objection that the notice of an improvement did not exactly conform to the specifications is unavailing if the objector is not injured thereby." Smith, Modern Law of Mun. Corp., § 1233.

In *Felker v. New Whatcom,* 16 Wash. 178, 47 Pac. 505, it was held that, where due notice of intention to improve a certain extent of street is given, the property owner cannot complain of want of notice by reason of the fact that subsequently another notice is published covering an improvement for which the former notice was given and a continuation of such improvement, although the subsequent publication may not afford notice for such length of time as the law requires; and in sustaining the view that such proceedings were to be liberally construed, cited approvingly Elliott on Roads and Streets, pp. 431, 432 where it is said:

"If the property is well described and the officers have done all that reasonable diligence enabled them to do, the assessment should be upheld. Immaterial inaccuracies in naming the owners ought not to be allowed to defeat the proceedings. Where the assessment is made by a municipal corporation, and for the improvement of a street, there is much reason for giving little weight to errors in names if the property assessed is properly described, since from the nature of the proceedings and the character of the improvement it is hardly conceivable that an owner can be ignorant of what has been done, and if he knows the facts, he must know, as matter of law, that his property is liable for the assessment."

These remarks might properly be applied to the objections raised by the appellants in this case which we have so far discussed.

As to the contention that the law required the publication

to be made in the official newspaper, and that there was no showing that the Yakima Democrat was the official paper, it appears that the Democrat had been the official paper of the city, but that the time for which it had been designated had expired and no official paper had been designated. If there was any official paper, it was the Yakima Democrat; and if there was not, some paper must necessarily be chosen, and the Democrat in this case was chosen and would, in any event, be *de facto* the official paper for the purpose of this publication.

The complaint urged by the appellants that the city authorities did not act to the best advantage in letting the contract is not a jurisdictional question, and, even if it were to be admitted that a better bargain might have been made, it seems to be established that questions of this kind, in the absence of collusion or fraud, are submitted to the discretion of the city council, and that its action in that respect is binding upon the property owners. Mr. Elliott, in his work on Roads and Streets (2d ed.), § 586, states the rule thus:

"By some of the courts it is held that the acceptance of the work by the highway officers is only *prima facie* evidence that it has been done according to contract, and this is obviously correct in cases where the statute gives the right of appeal and, either expressly or by fair implication, authorizes the trial of all questions on appeal, or expressly enumerates what shall not be tried, and does not include in the enumeration the question whether the work was or was not performed as the contract requires. According to the great weight of authority the rule, in the absence of a statute granting a right to contest the question whether the work has been done in conformity to the terms of the contract, is that the acceptance by the highway authorities is conclusive upon the property owners."

The author then states that it is not without dissent that this rule has found general favor, and personally criticizes it unfavorably. But there are no authorities that go to the extent of holding that, in the absence of fraud or collusion,

the acceptance by the city is not conclusive upon the property owners. This question was also squarely decided by this court in *Elma v. Carney,* 9 Wash. 466, 37 Pac. 707, where it was held that the conclusion of a town council that the work done under a contract let by it for the grading of a street has been properly performed, cannot, in the absence of bad faith or palpable mistake, be set aside by the courts; citing Cooley on Taxation (2d ed.), 671. The case of *Haisch v. Seattle,* 10 Wash. 435, 38 Pac. 1131, did not intend to overrule this case or to lay down any doctrine in conflict with it.

There is nothing in the record indicating that the assessment was not made with reference to benefits. It appearing that the substantial requirements of the statute had been complied with by the city council, and that the appellants had the notice which the law contemplated, and no errors appearing in the trial in the superior court, the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5888. Decided December 18, 1905.]

THE STATE OF WASHINGTON, *on the Relation of J. F. Lane, as Guardian of the Estate of Edwin Eskildsen, a Minor, Appellant,* v. R. A. BALLINGER, *as Mayor of Seattle, et al., Respondents.*[1]

INFANTS — GUARDIAN AD LITEM — AUTHORITY — SATISFACTION OF JUDGMENT. A guardian *ad litem* appointed to prosecute an action for a minor has power to satisfy the judgment obtained.

ATTORNEY AND CLIENT—AUTHORITY TO SATISFY JUDGMENT OF INFANT. An attorney employed by a guardian *ad litem* to prosecute an action for a minor has authority to receive payment of the judgment and enter satisfaction thereof, where there is no general guardian, especially in view of Bal. Code, § 4766, providing that attorneys may receive payment, and acknowledge satisfaction, of judgments.

[1]Reported in 82 Pac. 1018.

JUDGMENTS—AGAINST MUNICIPALITY—SATISFACTION—STATUTES—CONSTRUCTION. Bal. Code, § 5676, prescribing the method of satisfying judgments against a municipality, and providing for the issuance of an order for the amount of the judgment "in favor of the party for whom the same was given" does not require that the order be made to the judgment creditor; but, construed in connection with Bal. Code, § 5676, providing that the attorney may receive payment and satisfy the judgment, authorizes the issuance of an order to the attorney of the party, and the same operates to discharge the judgment.

Appeal from a judgment of the superior court for King county, Frater, J., entered August 3, 1905, in favor of the defendants, dismissing the action, upon sustaining a demurrer to an application of a guardian for a writ of mandamus to compel the issuance of a warrant for a portion of a judgment in favor of a minor, paid to and satisfied by the minor's attorneys. Affirmed.

F. E. Brightman, John Larrabee, and *A. J. Tennant,* for appellant, contended, *inter alia,* that a guardian *ad litem* has no power to receive payment of or satisfy a judgment. *Miles v. Kaigler,* 10 Yerg. (Tenn.) 10, 30 Am. Dec. 425; *Carpenter v. Schermerhorn,* 2 Barb. Ch. 314; *Bernard v. Merrill,* 91 Me. 358, 40 Atl. 136; *Gulf etc. R. Co. v. Younger,* 19 Tex. Civ. App. 242, 45 S. W. 1030; *Gulf etc. R. Co. v. Styron,* 66 Tex. 421, 1. S. W. 161; *Galveston etc. R. Co. v. Hewitt,* 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32; *Galveston Oil Co. v. Thompson,* 76 Tex. 235, 13 S. W. 60; *Austin v. Colgate* (Tex. Civ. App.), 27 S. W. 896; *Cody v. Roane Iron Co.,* 105 Tenn. 515, 58 S. W. 850; *American Lead Pencil Co. v. Davis* (Tenn.), 67 S. W. 864; *Fletcher v. Parker,* 53 W. Va. 422, 44 S. E. 422, 97 Am. St. 991; 17 Am. & Eng. Ency. Law (2d ed.), 859; 14 Ency. Plead. & Prac., 1037.

Scott Calhoun and *O. B. Thorgrimson,* for respondents.

DUNBAR, J.—On September 28, 1901, Edwin Eskildsen, a minor, suing by his guardain *ad litem* George A. Eskildsen,

recovered a judgment against the city of Seattle in the superior court of King county, in the sum of $11,000 together with costs taxed at the sum of $25.55. On appeal to this court said judgment was affirmed, and a remittitur was duly filed with the clerk of said superior court. Satisfaction of said judgment against the city was acknowledged by John E. Humphries and E. P. Edsen, the attorneys for plaintiff in the prosecution of the action against the city, on the 17th day of October, 1902, and said acknowledgement of satisfaction was entered upon the execution docket in the office of the clerk of the superior court of King county. The clerk of said court, on the same day, issued a duly certified transcript of the docket of said judgment, in which transcript was included a memorandum of satisfaction by said attorneys and the entry thereof.

Thereafter, on the same day, said attorneys presented this transcript to the mayor of the city and the comptroller thereof, they being the officers authorized to draw orders or warrants on the treasurer thereof. The said mayor and comptroller thereupon issued a warrant on the treasurer of said city, in favor of John E. Humphries and E. P. Edsen, attorneys, for the full amount of said judgment. Thereafter, letters of guardianship were duly and regularly issued to one James D. Hoge, Jr., on the estate of said Edwin Eskildsen, and on the 25th of February, 1903, said Hoge, as such guardian, received out of the moneys obtained upon the warrant drawn as aforesaid the sum of $4,000. He received no other or greater amount of moneys derived from said warrant, and no other or greater sum for or on account of the amount of said judgment.

Upon the resignation of said Hoge as guardian, letters of guardianship were duly issued to J. F. Lane, relator herein. No other or greater sum than the $4,000 aforesaid ever having been paid to any duly appointed, qualified, and acting guardian of said minor, or to any person authorized or empowered to receive the same for him, the relator, on the 22d

day of November, 1904, caused to be served upon the respondents herein a notice in writing, requesting and demanding that said respondents issue to relator, as such guardian, a warrant drawn upon the treasurer of said city of Seattle, directing the said treasurer, out of any sums applicable to and available for said purposes, to pay the relator the amount of such judgment, with interest thereon, less the sum of $4,000 previously received. Respondents refused to comply with said demand; and relator, claiming that he had no plain, speedy, and adequate remedy in the ordinary course of law, thereafter, on the 30th day of November, 1904, filed in the superior court for King county his affidavit and application for an alternative writ of mandamus, which affidavit and application set forth in detail the facts above stated. An alternative writ was issued on this application, commanding the respondents to issue a warrant in favor of appellant, directing the city treasurer to pay into court for said minor the unpaid portion of the judgment aforesaid or show cause why he had not done so. Respondents filed a general demurrer to this application, which the court sustained, and relator electing to stand on his application, judgment was entered dismissing the case. From this judgment of dismissal, the appellant prosecutes this appeal.

The relator contends that he is entitled to the relief asked for in his writ of mandamus, on two grounds: (1) That the payment of a judgment or decree to a guardian *ad litem,* or to the attorneys employed by him, is a nullity and does not discharge the judgment or decree; (2) that the payment of the amount of this judgment to the attorneys employed by the guardian *ad litem* in the suit brought by the minor against the city is not such payment as is authorized and provided for by Bal. Code, § 5676, providing the manner of the payment of judgments by municipal corporations, and therefore does not discharge the judgment.

Disregarding the extraneous matter suggested in respondents' brief, and investigating the case with reference simply

to the allegations of the complaint, we have concluded that no error was committed by the court in sustaining the demurrer thereto. For reasons that are manifestly commendable, courts have always jealously guarded the rights of infants. At the same time, it frequently becomes necessary for infants to prosecute lawsuits for the protection of their rights in courts of justice, as it was in this case; and as a rule the same procedure that is applicable to the trial of lawsuits in other cases must of necessity be applied to the trial of lawsuits where minors are parties, either plaintiff or defendant.

Upon the question involved in appellant's first proposition, there is some conflict of authority, although the conflict upon an examination of the cases is more with relation to the power of a guardian *ad litem* or *prochein ami* than to the power of an attorney, some courts holding that the guardian *ad litem* has no power to satisfy the judgment or decree in favor of the infant, while others hold exactly the reverse.

The first case cited by appellant, that of *Miles v. Kaigler,* 18 Tenn. 10, is scarcely in point in what was really decided, because that case involved the compounding of a judgment with the debtor, instead of the satisfaction of the judgment, and the action of an attorney in fact instead of an attorney at law; and an examination of the case shows that the court was largely influenced in its determination by the fact that fraudulent circumstances were alleged and, in the mind of the court, sustained. The case which the appellant specially recommends to the attention of the court, viz., *Cody v. Roane Iron Co.,* 105 Tenn. 515, 58 S. W. 850, decides this proposition squarely in appellant's favor. There it is held that, where a minor recovers a judgment in an action brought by his next friend, a payment thereof to the latter will not operate as a satisfaction, since a next friend has no right to receive money in satisfaction of such judgment, the minor's guardian being alone entitled thereto, the court saying:

"That right belongs alone to the regular guardian during the continuance of minority, or to the beneficiary himself

after attaining his majority, and a payment made to the next friend will not operate as a satisfaction."

Several other cases are cited by appellant which seem to sustain its contention. It will be noticed, however, that none of the cases cited, and none that we have been able to find, has decided that the attorney of the minor has not the right to satisfy the judgment.

The relator insists that, inasmuch as under the authorities which he has cited the guardian *ad litem* had no right to satisfy the judgment, an attorney appointed by said guardian *ad litem* could not have any greater authority than the appointing power. Conceding that the authorities on the main proposition sustain relator's contention, it does not necessarily follow that the attorney would not have such power; for the attorney is an officer of the court, and his appointment is not made as an attorney for the guardian *ad litem* but as an attorney for the minor, and there is reason in the thought that the same powers which he would obtain by reason of his employment as an attorney in other cases would attach to his employment as an attorney for a minor. But we think, from an investigation of all the authorities, that the great weight of authority is to the effect that the guardian *ad litem,* while not clothed with the power to compound or settle the judgment in favor of the minor, has a right to satisfy the same; and there seems to be no authority holding that the attorney for the minor has no such right. On the contrary, the general rule in this country seems to be that he has. On this proposition Mr. Freeman, in his work on Judgments (4th ed.), § 462, after laying down the general doctrine that an attorney at law retained to prosecute a demand has, by virtue of that retainer, authority to receive payment of the judgment when recovered, proceeds:

"The relation of a *prochein ami* to the action is that of an officer of the court specially appointed to enforce and preserve the rights of the infant in whose behalf he acts. He may employ an attorney, carry the suit on to judgment, and

may, if there is no regularly constituted guardian of the infant, receive the money recovered of the defendant, and thereupon may enter a valid satisfaction of the judgment;"

citing several cases to sustain the text; and proceeding:

"The attorney who is employed by the *prochein ami* to prosecute the suit is thereby authorized to receive payment of the judgment, and to enter satisfaction thereof when such payment is made."

In Black on Judgments (2d ed.), § 986, it is said:

"Payment may also, as a matter of course, be made to an agent of the plaintiff duly authorized to collect the judgment, or to the *prochein ami* of an infant plaintiff who has no regular guardian."

It will be noticed in this case that, at the time of the satisfaction and payment of this judgment, the minor had no regular guardian. In *Baltimore etc. R. Co. v. Fitzpatrick,* 36 Md. 619, where an action was brought for, and in the name of, an infant who sued by a *prochein ami,* and judgment having been recovered by the plaintiff, the amount thereof was paid by the defendant to the attorney of record, who was regularly employed by the *prochein ami* to conduct the action, and by order of the attorney the judgment was entered satisfied, and at the time of the payment to the attorney, there was no regularly constituted guardian of the beneficiary plaintiff to receive and receipt for the money recovered; it was held that the payment by the defendant to the attorney of record was a good discharge of the judgment, and his act in receiving the money and directing satisfaction of the judgment to be entered was binding upon the infant plaintiff. In *Stroyd v. Traction Co.,* 15 Pa. Sup. Ct. 245, it was held that an attorney employed by the *prochein ami* of an infant, where there is no guardian, is clothed with authority to receive and receipt for money due upon a judgment entered upon a verdict in suit for damages suffered by an infant, and the payment by the defendant to the attorney of record was

binding upon the infant. In the course of the opinion it is said:

"When the *prochein ami* has duly appointed an attorney to prosecute the proceedings the latter becomes the attorney in the case, he is the attorney for the infant, to whom he must answer."

Upon the whole investigation, we are satisfied that the attorney of the minor had a right to satisfy the judgment in this case.

However, in addition to the general authority, it seems to us that this question is settled by our own statute. Bal. Code. § 4766, in setting forth the powers and authority of attorneys and counselors, in subd. 2, provides, among other powers:

"To receive money claimed by his client in an action or special proceeding during the pendency thereof or after judgment upon the payment thereof, and not otherwise, to discharge the same or acknowledge satisfaction of the judgment."

It will thus be seen that the letter of the law most assuredly sustains the respondents' contention, for the statute especially clothes the attorney with authority, not only to satisfy the judgment, but to receive the money, and there is no limitation as to the character of the employment or the kind of clients. To insure the orderly transaction of lawsuits for the benefit of minors, as in other cases, attorneys must be clothed with some discretion and power, and so far as the equities are concerned, which are sought to be invoked by the relator, there do not seem to be any in favor of the relator as against the city. The city has paid its obligations in full, in the ordinary and orderly course, to the relator's regularly constituted agents or attorneys, the same attorneys through whose services and endeavors the judgment in favor of the minor was obtained. If relator's attorneys have in any way violated their duty, he must look to them for redress, for the attorney is employed, not for the benefit of the guardian *ad litem,* but for the benefit of the minor, to whom he is

liable for negligence and malfeasance in the course of the employment.

It is insisted by the relator that, under the provisions of Bal. Code, § 5676, the law was not complied with. The statute is as follows:

"If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows: (1) The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof; (2) on the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation; (3) the certified transcript herein provided for shall not be furnished by the clerk, unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as in ordinary cases. The clerk shall include in the transcript the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon."

The application alleged the compliance with this statute, except that the warrant drawn by the mayor and comptroller of the city of Seattle was drawn in favor of John E. Humphries and E. P. Edsen, attorneys, instead of being drawn in favor of the minor person in whose favor the judgment was rendered; and it is contended that, under the provisions of the statute, the warrant, in order to render the city not liable, should have been drawn in favor of the minor, he being the party in whose favor the judgment was given; that, it not

having been drawn in favor of the party, the law has not been complied with, and that the judgment has never been satisfied within the contemplation of the law.

We think, however, that this statute must be construed in connection with the statute we have cited above, which confers upon the attorney the power to satisfy the judgment. That power was given without limitation as to the character of cases, and there is nothing in the statute to indicate that any distinction was sought between cases where minors had obtained judgment and where judgments had been obtained by adults, the object of the statute simply being to distinguish for obvious reasons the different procedures in collecting judgments against individuals and judgments against municipal corporations. If a rigid construction is to be given to the word "party," then we think there is force in relator's contention that the word "party" in subd. 1 of § 5676, would have to be construed to be in this case the minor instead of his attorneys, who would have to present a certified transcript. If so, no proper transcript has ever been presented, and, until this is done, the city officials, under this construction of the statute, would have no power to issue the warrant prayed for. But this suggestion is only made to show that the construction contended for by relator is not a practical one; that the proper construction is that the word "party" has reference to the party to the action or to his attorneys.

The judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

[No. 5821. Decided December 18, 1905.]

C. E. Jones *et al., Appellants,* v. H. S. Emerson *et al., Respondents.*[1]

Sales—Breach of Warranty—Evidence of Expert—Competency. In an action for breach of warranty on the sale of apples, found upon arrival to be infected and unmerchantable, the testimony of an expert to the effect that if infected upon their arrival they could not have been merchantable at the date of the sale, is competent.

Sales—By Sample—Breach of Warranty—Findings—Evidence—Sufficiency. There is sufficient evidence of breach of warranty as to the quality of apples sold, when it appears that they were warranted to be merchantable and of good quality, that most of them were found to be infected and were condemned and destroyed by the fruit inspector, and that the vendor was notified of such official action and made no investigation as to the facts; and the fact that the purchaser inspected certain boxes before buying and was satisfied as to the quality, does not preclude a recovery, where it is not shown that he inspected that portion that was condemned.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 14, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

McAulay & Meigs and *James E. Bradford,* for appellants.

W. H. Bogle, for respondents.

Crow, J.—This action was commenced by appellants, C. E. Jones and B. G. Stone, partners as C. E. Jones & Company, against H. S. Emerson and Frank Wheeler, partners as H. S. Emerson & Company, to recover $500 for apples shipped from North Yakima. Appellants alleged that, on March 21, 1903, respondents purchased four hundred boxes of apples from them, at $1.25 per box, f. o. b. cars at North Yakima; that appellants, on March 23, 1905, loaded said apples on a Northern Pacific car and billed the same to re-

[1]Reported in 82 Pac. 1017.

spondents at Seattle, where they were delivered; that the purchase price was payable on delivery, but that on demand payment had been refused. Respondents pleaded two affirmative defenses, which we will not quote as, upon trial without a jury, the court made findings of fact in conformity therewith, and refused findings requested by appellants. From a judgment in favor of respondents, this appeal has been taken.

The findings show that, on March 21, 1903, appellants contracted to sell respondents four hundred boxes of apples, at $1.25 per box, f. o. b. cars at North Yakima, said apples to be selected by appellants, to be shipped to Seattle, and to be of first quality, merchantable, and similar to samples shown respondents; that, on March 23, 1903, appellants did ship four hundred boxes of apples, which were delivered to respondents at Seattle on or about March 26, 1903; that said apples were not of first quality or merchantable, nor similar to samples shown respondents, but were infected with San Jose scale and codling moth; that said apples were taken from the car into respondents' warehouse, where they were forthwith examined by the fruit inspector of King county; that the contents of three hundred and eighteen of the four hundred boxes were thereupon condemned and destroyed by said inspector; that respondents immediately notified appellants of the condition of said apples and of the official action of said inspector, and that said apples would be held for the risk and account of appellants; that respondents tendered appellants the sum of $70, the contract price for eighty-two boxes not condemned, less freight paid on the three hundred and eighteen boxes condemned, and deposited said tender with the clerk of the superior court subject to appellants' order.

Several assignments of error are based on rulings admitting and rejecting evidence. It is our duty to ignore all incompetent evidence. Still, while refraining from a detailed discussion of these various assignments, we fail to find any

prejudicial error either in admitting or rejecting evidence. In fact, we think the rulings of the trial court were without error in this regard.

The next assignment of error is on the findings made, appellants contending they were not supported by the evidence. Although much conflict exists, we fail to see how any other findings could have been made, as circumstances and facts that unquestionably occurred corroborate respondents' evidence. Frank Wheeler, one of the respondents, testified that, while in North Yakima on March 20th, he was at appellants' warehouse and examined about eight boxes of apples, selected and shown him by appellants; that on March 21 he again examined about fifteen additional boxes, also selected and shown him by appellants, and that all said apples were merchantable and of good qaulity. Appellants testified that Mr. Wheeler examined about forty or fifty boxes, he himself making the selections; that he expressed himself satisfied with the quality, and that the apples examined by him were merchantable. There were not enough apples in said warehouse to fill the order, and appellants purchased sixteen additional boxes after Mr. Wheeler left North Yakima. The four hundred boxes were received in Seattle about March 26, 1903, when the contents of three hundred and eighteen boxes were found to be affected with San Jose scale, codling moth, and rot, and were condemned and destroyed. Respondents immediately notified appellants by long-distance telephone of these conditions, and requested that a member of appellants' firm come to Seattle to inspect the apples, offering to pay his railroad fare. They also gave written notice to the same effect by letter. Appellants failed to go to Seattle, or to make any personal inspection, or to take any action prior to the bringing of this suit. The fruit inspector, an expert, testified that if the apples were in merchantable condition at North Yakima on March 21, they could not have been in the condition in which they arrived at Seattle on March 26. This evidence was objected to, but we think it competent.

While these are only a portion of the facts favorable to respondents appearing from the evidence, yet they support the findings, which we will not disturb.

As Mr. Wheeler made some examination of certain apples at North Yakima, appellants insist that he dealt with them at arm's length, and as no fiduciary or confidential relation existed between the parties, respondents are therefore not in a position to complain of the apples shipped. In making this contention appellants rely upon *Griffith v. Strand,* 19 Wash. 686, 54 Pac. 613; *Sherman v. Sweeny,* 29 Wash. 321, 69 Pac. 1117; *Hulet v. Achey,* 39 Wash. 91, 80 Pac. 1105, and other cases decided by this court. The trial court found that appellants warranted the apples to be merchantable and of good quality, and that they contracted to ship apples of that kind. Mr. Wheeler did not examine the contents of the entire four hundred boxes, but only such portions thereof as were exhibited to him by appellants. Moreover, the apples were loaded on the car and shipped after Mr. Wheeler left North Yakima. We therefore think the authorities cited do not apply to the facts involved. The contract of purchase was made by respondents upon condition that the apples shipped should be of the kind and quality shown to Mr. Wheeler. It appearing that those actually shipped were not of such quality, appellants failed to comply with their contract. Respondents promptly notified them of such failure, and tendered all money that would be due for the apples actually used. Under the facts found, appellants were not entitled to recover.

The judgment is affirmed.

Mount, C. J., Dunbar, Hadley, Fullerton, Rudkin, and Root, JJ., concur.

[No. 5721. Decided December 19, 1905.]

W. T. STOLL, *Respondent*, v. THOMAS S. GRIFFITH *et al.*, *Appellants*.[1]

TAXATION — FORECLOSURE OF LIEN — SUMMONS — SUFFICIENCY. A summons in foreclosure of a tax lien is not invalidated by reason of an unnecessary explanation as to what is meant by the date of service, when otherwise in proper form.

SAME—TO WHOM ADDRESSED. A summons in foreclosure of a tax lien addressed to Emil Coulon is sufficient where he appears to have been the owner of the property at the time the same was assessed, although it was assessed to E. Coulon.

SAME—DEED—PRESUMPTION OF REGULARITY—IRREGULARITIES IN RETURN OF SALE—EFFECT. The validity of a tax deed is not affected by the recitals of the treasurer's return of sale, where the law does not require or authorize such return but makes the deed *prima facie* evidence that the sale was conducted in the manner provided by law, especially where such return recites that the sale was so conducted, and its other recitals are not necessarily inconsistent therewith.

SAME—TAX TITLE—WHO MAY ACQUIRE—GRANTEE UNDER DEFECTIVE DEED. The purchaser of premises from tenants in common, whose deed may be defective as to part of the grantors, may further assure his title by acquiring a tax title which accrued prior to his ownership of the property, and he is not to be held to have acquired the title in the interest of any of the former owners as tenants in common with him.

VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE. A contract of a vendor to further assure the title by the acquisition of a tax title is fully performed by acquiring the same and quitclaiming to the grantee, although the time for taking an appeal from the tax judgment has not yet expired.

Appeal from a judgment of the superior court for Spokane county, Irwin, J., entered January 3, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

A. E. Gallagher and *W. J. Thayer*, for appellants.

Graves & Graves, *B. B. Adams*, and *B. H. Kizer*, for respondent.

[1]Reported in 82 Pac. 1025.

RUDKIN, J.—On June 8, 1898, a final receiver's receipt issued to the heirs of George M. Mutchler, deceased, for the N. E. ¼ of Sec. 10, Tp. 25, N., R. 42, E., W. M. On the 16th day of November, 1898, this receipt was followed by a patent from the United States to the same parties for the same land. On the 14th day of October, 1898, Henry G. Mutchler, Katie Bittner, and Flora R. Wolcott, claiming to be all the heirs of George M. Mutchler, deceased, conveyed said premises by warranty deed to Emil Coulon. Henry G. Mutchler signed this deed in his own behalf, and as attorney in fact for the other grantors. On the 28th day of July, 1899, Emil Coulon and wife conveyed said premises by warranty deed to John Hoscheit, and on the 19th day of May, 1900, Hoscheit and wife conveyed the same by warranty deed to the plaintiff, Stoll. On or about the 26th day of June, 1903, the plaintiff, Stoll, exchanged said tract, and other lands, with the defendants, Griffith and wife, for certain property in the city of Spokane.

Pending the negotiations leading up to such exchange, an abstract of title to the above tract, and the other lands embraced in said exchange, was submitted to Post, Avery & Higgins, the attorneys then representing the defendants. Such attorneys, under date of June 25, 1903, furnished the defendants with a written opinion, pointing out the following defects in the title to said northeast quarter of section ten. First, the abstract failed to show that the parties signing the deed to Coulon were the heirs, or all the heirs, of George M. Mutchler, deceased; second, the spouses of said heirs should have joined in said deed, in case said heirs were married; and, third, the power of attorney from Katie Bittner to Henry Mutchler was insufficient to authorize the execution of a deed in her behalf. This opinion closed as follows:

"It appears from the abstract that certificates of delinquency have been issued against all of the northeast quarter of section ten, all of which have been assigned to W. T. Stoll. Unless the objections urged above can be cured otherwise, it

might be desirable to foreclose these delinquent tax certificates and clear the title in that manner."

On said 26th day of June, 1903, the plaintiff and the defendants entered into a written agreement, which recited the conveyance of the property in the city of Spokane to the plaintiff, and that said property was subject to a mortgage in the sum of $1,500, and the lien of certain street grade assessments; also, the conveyance of said northeast quarter of section ten, and other property, to the defendants, and that there were certain irregularities, perhaps defects, in the title to the northeast quarter of section ten, which it was believed could be corrected. The agreement then proceeds as follows:

"Now therefore, this agreement is as follows: If the title to said northeast quarter of section ten (10), township twenty-six (26) north, of range forty-two (42) E., W. M., shall, at any time hereafter be, in any manner of means whatsoever, either by suit, foreclosure or otherwise, quieted and perfected in the first parties, but at the expense of the second party hereto, then the said first parties shall immediately pay said mortgage of fifteen hundred dollars ($1,500) to the said Northwestern and Pacific Hypotheek Bank, with the interest due thereon at the rate hereof, or if the second party shall in the meantime have paid the same, first parties will pay to the said second party said fifteen hundred dollars and interest thereon to this date, and will likewise at said time pay the said street grade taxes or assessments that have been levied upon or against said property prior to this time, with interest thereon to the date hereof, but if there shall be a breach of the second party's warranty of the title to the said northeast quarter of section ten (10), township twenty-six (26) north, of range forty-two (42), E., W. M., by which ownership thereof is lost to the first parties, the maximum measurement of the first party's damage by reason thereof, shall be the amount of said mortgage of fifteen hundred dollars ($1,500), with interest thereon, and the said street grade taxes or assessments with the penalties heretofore levied against the property by the first parties. The second party shall proceed with such suits or proceedings as he deems necessary, either in his own name or in the names of the first parties, to quiet and perfect the title to said premises."

On the 23rd day of July, 1903, the plaintiff, Stoll, instituted proceedings in the superior court of Spokane county, to foreclose certain tax certificates which constituted a lien on the northeast quarter of section ten. Such proceedings were had therein that a judgment was regularly entered, foreclosing the lien of said taxes, on the 29th day of September, 1903. The property was sold by the treasurer of Spokane county on the 17th day of October, 1903, pursuant to said judgment, and bid in by one W. S. Rugh. On the same day Rugh received a tax deed therefor, and immediately quit-claimed said premises to the plaintiff Stoll. The plaintiff tendered this deed to the defendants as a full and complete performance of the above agreement on his part, but the defendants refused to accept the same. The plaintiff thereupon brought this action to recover the amount of the mortgage debt and the street grade assessments. The plaintiff had judgment below and the defendants appeal.

The respondent bases his right to recover solely upon the ground that the tax foreclosure constituted a full and complete performance of his contract. We will therefor, not consider the various supposed defects in the original title, which are discussed at length in the appellants' brief. The foreclosure proceedings seem to be regular on their face, and we will only discuss such irregularities or defects therein as the appellants have pointed out. It is first contended that the summons as published did not confer jurisdiction on the court, for the reason that it required the defendants to appear "within sixty (60) days after the service of this summons and notice upon you, exclusive of the day of service, to wit: within sixty (60) days, after the 30th day of July, 1903, which is the date of the first publication hereof;" instead of within sixty days after the first publication of summons, exclusive of the day of such first publication, as the law requires. This objection is without merit. The summons cited the parties to appear within sixty days from the date of service, exclusive of the day of service, and then

proceeded to explain what was meant by the date of service, viz., the date of first publication, which is therein set forth. A similar summons was sustained by this court in *Luff v. Gowan,* 38 Wash. 504, 80 Pac. 766.

The next objection is that the summons was addressed to Emil Coulon and others, whereas the property was assessed to E. Coulon. Emil Coulon appears to have been the owner of the property at the time the taxes were levied and assessed, but the property was assessed to E. Coulon. This objection is equally without merit. *Williams v. Pittock,* 35 Wash. 271, 77 Pac. 385; *Morrison v. Shipman* 37 Wash. 171, 79 Pac. 632; *Spokane Falls etc. R. Co. v. Abitz,* 38 Wash. 8, 80 Pac. 192; *Luff v. Gowan, supra; Carson v. Titlow,* 38 Wash. 196, 80 Pac. 299; *Allen v. Peterson,* 38 Wash. 599, 80 Pac. 849; *Rowland v. Eskeland,* 40 Wash. 253, 82 Pac. 599.

The next objection is that the tax sale was void because the entire 160 acres was sold in bulk whereas each forty acre tract was separately assessed, and was ordered sold separately. This objection is based on a return of sale, filed by the county treasurer, which contains the following recitals:

"I attended, as required by law, at the time and place fixed for said sale, stated the amount due on said premises for taxes, interest and costs of this proceeding, and offered said premises for sale at public auction according to law, and to the bidder offering to take the least part of said lot, piece or parcel in payment of said tax, interest and costs of proceedings, when W. S. Rugh, being the best and highest bidder therefor, the whole of said tracts and premises were struck off by me to the said W. S. Rugh for the sum of $93.95, being the full amount due thereon, which was the whole price bid therefor, and there being no other better bid, and which sum I acknowledge to have received from him, and that I have heretofore, upon the 17th day of October, 1903, as treasurer, executed and delivered to him a deed to said premises so sold, as required by law."

This return was neither authorized nor required by law, and cannot be permitted to overturn the tax deed, or destroy the effect which the law accords to such deed. The law in force when this deed was executed provides that the treasurer's deed shall be *prima facie* evidence, "that the sale was conducted in the manner provided by law." Bal. Code, § 1767, subd. 6. Furthermore, this return was made on a printed form and is not necessarily inconsistent with the other recitals therein, and in the tax deed, to the effect that the sale was conducted in the manner provided by law.

The next objection is that the respondent was a tenant in common with one of the Mutchler heirs, by reason of a defect in the power of attorney through which he deraigned his title, and that, as such tenant in common, he could not acquire title to the common property at a tax sale. If we assume that Katie Bittner was one of the heirs to whom the patent issued, and that the power of attorney under which an attempt was made to convey her interest in the property was defective, the fact remains that the respondent and those under whom he claims held the land in controversy adversely to her and to all the world, under color of title and claim of right, for a period of five years before the tax sale. It is a general rule that, if one cotenant acquire title to the common property at a tax sale, the title so acquired inures to the benefit of the other cotenants. Some courts base the rule upon the confidential relation existing between the cotenants; others, upon the ground that the obligation to pay taxes on the common property rests equally upon all the cotenants, and that it would be inequitable to permit one or any number of them to take advantage of his or their own default and acquire the title of their cotenant at a tax sale. The courts which adopt the latter view hold generally that one cotenant may acquire title to the common property, as against his cotenant, where the property is sold for a tax which accrued before he acquired an interest in the common property, and which he was not obligated to pay. *Oswald v. Wolf*, 129 Ill.

200, 21 N. E. 839; *Sands v. Davis,* 40 Mich. 14; *Lybrand v. Haney,* 31 Wis. 230; *Allen v. Dayton Hotel Co.,* 95 Tenn. 480, 32 S. W. 962.

But whether the rule is founded on the confidential relations existing between the cotenants, or upon the duty of the several cotenants to pay the taxes against the common property, we are satisfied that the rule does not, and should not, apply in a case like this. Blackwell on Tax Titles, § 566, states the rule thus:

"One may always strengthen himself against an *adverse claimant* by purchasing a tax title; for example, a mortgagee who has foreclosed, or a mortgagee as against one claiming under a former tax sale, or a junior tax claimant as against a senior. *A defective title* will not stand in the way of purchase at a tax sale. One whose only interest in the land is based on a void deed may buy a tax title. In general a purchase by a *tenant in common,* or the husband of a tenant in common, inures to the benefit of all the cotenants; but this is not so if the purchasing cotenant holds adversely to the others, or the tax title existed before his tenancy or he did not buy the tax title until after it had matured in the hands of third persons, thus dissolving the cotenancy."

See, also, Id. 573. In *Wright v. Sperry,* 21 Wis. 331, the Sperrys, while owning an undivided one-fourth interest in certain real property, mortgaged the whole thereof, and the whole was sold at foreclosure sale. Wright succeeded to the interest of the purchaser at the foreclosure sale, and bought in an outstanding tax title. The Sperrys meanwhile acquired the remaining three-fourths interest in the mortgaged property, and claimed that they were tenants in common with the purchaser at the foreclosure sale, and that the tax title so acquired inured to their benefit. After stating the correlative rights and duties of cotenants, the court said:

"These authorities show that the doctrine of *Van Horne v. Fonda* applies only where tenants in common are in actual possession of the land, or where one enters as such tenant, and so his possession is the possession of all the tenants. During such possession, each is under obligation morally and

legally to protect their common estate, and if any one expends money in so doing, as in paying taxes, liens thereon, or buying in an adverse title, he has a right of action against his cotenant to recover the share he should have contributed. While he claims as a cotenant, he is presumed, if he buys in an outstanding title or pays off an incumbrance, to act not only for himself but for his cotenants. But after one tenant denies the rights of his cotenants, and claims the whole property, such claim being known to them, they have no longer any reason to suppose that in anything he does respecting the land he acts for them; but on the contrary they know that he claims and intends to act solely for his own benefit. It is then no longer a fraud on their rights for him to buy in an outstanding title, and hold it exclusively for his own benefit. Certainly it is not unreasonable so to hold, if he may, without such outstanding title, by merely entering into possession of and claiming the whole land, acquire by adverse possession a perfect title to the whole, unless his cotenants within twenty years commence an action against him."

We are satisfied that the rule here announced is the correct one, and that no rule of law or public policy forbade the respondent to further assure his title by acquiring the tax title, under the facts and circumstances of this case. The mere fact that the time to move against or appeal from the tax judgment had not expired when this action was commenced will not preclude a recovery. The court below could only look to the proofs offered to ascertain whether the respondent had complied with his contract. The court found that he had, and gave judgment accordingly. We find no error in the judgment, especially in view of the fact that the refusal of the appellants to accept the title was based solely on the ground that the tax foreclosure was void. The judgment is therefore affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, ROOT, and FULLERTON, JJ., concur.

[No. 5729. Decided December 19, 1905.]

WILLIAM B. OGDEN, *Respondent*, v. CHEHALIS COUNTY, *Appellant*.[1]

APPEAL—RECORD—SERVICE OF PAPERS—SUPPLEMENTAL RECORD. A motion to strike a statement of facts and briefs because not duly filed or served will be denied where a supplemental record is filed negativing the grounds of the motion.

APPEAL—REVIEW—CESSATION OF CONTROVERSY. An appeal from a judgment against a county will not be dismissed on the ground of the cessation of the controversy, from the fact of a satisfaction of the judgment and the issuance of a warrant by the county auditor, where it appears that the satisfaction was entered pursuant to Bal. Code, § 5676, for the purpose of securing a warrant for its payment, which is in lieu of an execution, and it does not appear that the county authorities have ever authorized a voluntary payment, but the case stands as an ordinary case where execution has been levied.

JUSTICES OF THE PEACE—COMPENSATION—ELECTED IN CITY OF LESS THAN 5000 INHABITANTS—GROWTH OF CITY TO SUCH POPULATION—EFFECT—STATUTE—CONSTRUCTION. Laws 1897 p. 110, providing that after the election to be held in November, 1898, there shall be but one justice of the peace in cities having more than five thousand inhabitants, whose salary shall be $1,200 per annum, supersedes the act of 1891, providing a salary for all justices in such cities; and hence no salary is fixed for the justices in a city of less than five thousand inhabitants, during the time after such city acquires more than five thousand inhabitants, until one of them is duly elected at a biennial election a justice of a city of that size (RUDKIN, J., dissenting).

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 23, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a justice of the peace to recover his salary. Reversed.

E. E. Boner, W. H. Abel, and *John C. Hogan,* for appellant.

C. W. Hodgdon, for respondent.

[1]Reported in 82 Pac. 1095.

HADLEY, J.—This is an action to recover of Chehalis county an amount which the plaintiff claims is due him as salary for services as justice of the peace in the city of Hoquiam in said county. The complaint alleges, that the city of Hoquiam is a city of the third class, and that during the months of July, August, and September, 1904, it had more than 5,000 inhabitants; that, prior to the commencement of this action, the plaintiff paid to the treasurer of the said county all fees and fines by him collected from any source during the months above named; that the plaintiff filed with the county auditor his claim for salary, and that the auditor, by direction of the board of county commissioners, refused to draw a warrant therefor. Judgment is asked for the amount claimed as accrued salary.

The answer alleges, that the plaintiff and one Warren were elected and qualified as justices of the peace for the city of Hoquiam and the precincts thereof, at a time when said city contained less than 5,000 inhabitants; that ever since, and particularly through the months for which plaintiff claims a salary, both plaintiff and said Warren were holding the office of justice of the peace, and both were acting as justices for the city of Hoquiam and the precincts thereof; that said Warren is also claiming a salary, and has commenced suit to recover the same. A demurrer to the affirmative matter in the answer was sustained, but the cause went to trial upon the issues made by denials in the answer. The cause was tried by the court without a jury. It was stipulated in writing that during the months of July, August, and September, 1904, the population of the city of Hoquiam was more than 5,000. Judgment was rendered for the plaintiff, and the county has appealed.

Respondent moves to strike the statement of facts for the alleged reason that it was not filed in time, and for the further reason that no copy thereof was served upon respondent. A supplemental record filed by appellant negatives the grounds stated, and the motion is denied. The same is true

of a motion to strike appellant's brief, which is also denied.

Respondent further moves to dismiss the appeal, for the reason, as he alleges, that the judgment has been fully paid and satisfied by voluntary payment made before the appeal was taken. Respondent in his brief directs our attention to no part of the record in support of his motion except the statement of facts. The following recital is inserted in the statement of facts:

"That on January 23d, 1905, the plaintiff demanded and the clerk duly issued to him an abstract of judgment therein granted and thereupon the plaintiff duly acknowledged payment of said judgment and satisfied and discharged the said judgment in full on the records and files of said cause and court and said satisfaction and discharge was made on January 23d, 1905."

Appellant also concedes in its brief that a warrant was the same day issued by the county auditor. The satisfaction mentioned was entered an the same day the judgment was entered. It was a satisfaction entered by respondent, and it is not shown that appellant authorized it. It shows upon its face that it was entered for the purpose of procuring from the clerk a certified transcript of the judgment as is required in the case of judgments against municipal corporations. Bal. Code, § 5676. Such a transcript takes the place of an execution under ordinary judgments, and the above statute provides that, when it is presented to the officer of the municipality who is authorized to draw orders on the treasury thereof, it shall be the duty of such officer to draw an order for the amount of the judgment. Neither the satisfaction of the judgment, nor the issuance of an order by a mere ministerial officer whose duties are prescribed by law, amounts to a voluntary payment of the judgment, unless the municipality especially authorizes it as such payment. An appeal may be taken from the judgment within the time provided by law, notwithstanding the entry of satisfaction and the issuance of an order by a mere ministerial officer. There is nothing here

to show that the county authorized the satisfaction or the issuance of an order as a voluntary payment of the judgment. The case stands as any other case where execution has been levied upon property and the judgment involuntarily satisfiled through execution prior to perfecting an appeal. In such cases relief is afforded through the statute, Bal. Code, § 6526, the pertinent portion of which is as follows:

"If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof."

The motion to dismiss the appeal is denied.

Respondent contends that, under the authority of *Anderson v. Whatcom County,* 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, he is entitled to recover. That decision was rendered in 1896 and at a time when the law of 1891 was in force. See, Laws 1891, p. 8. Section 1 of that act provided that justices of the peace in cities of the third class having more than 5,000 inhabitants should receive an annual salary of $1,200. It was also provided that the population of a city for the purpose should be determined by the last state or Federal census. Art. 4, § 10, of the state constitution, contains the following provision:

"The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties, and jurisdiction of justices of the peace. *Provided,* That such jurisdiction granted by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use."

It was held in *Anderson v. Whatcom County, supra,* that it is not competent for the legislature to limit the ascertainment of the population to a state or federal census; that the fact may be otherwise competently ascertained, and when so done, the above constitutional provision is self-executing and immediately confers upon qualified justices in such cities the salary provided for them by law. If the legislature had provided no salary for such as Anderson, there could have been no recovery, even though a population of 5,000 existed. Therefore the pertinent inquiry here is, has the legislature provided by law for the payment of a salary to such as respondent? Prior to the Anderson decision, the legislature had, by the act of 1891, fixed a salary for all justices in such cities without any qualification or limitation as to number or otherwise, and it follows that all such were entitled to the salary. In 1897, however, a new act was passed in relation to the same subject. Laws 1897, p. 110, chap. 66. The act is as follows:

"An Act relating to justices of the peace and constables in cities having more than five thousand inhabitants, and fixing their number and salaries.

"*Be it enacted by the Legislature of the State of Washington:*

"Section 1. There shall be elected at the general election to be held in November, 1898, and biennially thereafter in cities of more than five thousand inhabitants only one justice of the peace and one constable and no more.

"Sec. 2. The salaries of justices of the peace and constables elected at the general election to be held in November, 1898, and biennially thereafter in cities of more than five thousand inhabitants shall be as follows: (1) Salaries of justices of the peace, twelve hundred dollars per annum, payable as now provided by law. (2) Salaries of constables, seven hundred and twenty dollars per annum, payable as now provided by law."

The act contains no repealing clause, but inasmuch as it deals with the same subject-matter as the previous act of 1891, it must be held to have superseded the earlier act in all

things wherein it is inconsistent with the earlier one. It will be seen that the act of 1897 limits the number of justices in cities of 5,000 inhabitants to one, after the general election of 1898, and fixes a salary for such only as should be elected at that time and biennially thereafter in cities of more than 5,000 inhabitants. Under the constitution, the fixing of the salary rests entirely with the legislature, and by the act of 1897 it did fix it and definitely stated that the salary is for such as should be elected in 1898 and biennially thereafter. Respondent was neither elected at such biennial election in a city of more than 5,000 inhabitants, nor was he serving as the successor by appointment of one so elected. It is manifest that the legislature did not intend to establish the anomalous condition that will prevent the payment of more than one salary following a biennial election after a city contains more than 5,000 inhabitants, and will at the same time permit the payment of more than one from the time a population of 5,000 is actually reached until such biennial election occurs. Such an intention is neither supported by ordinary reasoning nor by the most common business methods. To avoid such a result, the legislature, in effect, has said that there shall be no salary for a justice of the peace in a city of 5,000 or more until such justice is elected at a regular biennial election after the 5,000 limit has been reached. It follows that there was no law fixing a salary for respondent during the time for which he makes his claim.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting) — The respondent occupies a singular position. He is a duly elected, qualified, and acting justice of the peace. Under the decision in *Anderson v. Whatcom County,* 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137, the self-executing provision of the state constitution

cuts off his fees, and now this court cuts off his salary. All is lost but honor. If the decision in *Anderson v. Whatcom County* is correct, I do not think that the act of 1897 repeals by implication the act of 1891 as to salaries accruing between the time the population reaches five thousand and the next ensuing general election. I think the case of *Anderson v. Whatcom County* should be overruled, or this case affirmed. I therefore dissent.

[No. 5775. Decided December 19, 1905.]

JOHN H. JOHNSON *et al., Appellants,* v. THE CITY OF TACOMA, *Respondent.*[1]

EVIDENCE—EXPERT—VALUES. Opinion or expert evidence is admissible to show the amount of benefits to real estate by reason of local improvements.

EVIDENCE—EXPERTS—COMPETENCY. Real estate men having knowledge of the neighborhood are qualified to give opinion evidence as to the value of benefits from local improvements.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—EVIDENCE—ADMISSIBILITY. It is immaterial that papers were introduced in evidence to show the authority of the commissioner of public works to deduct sums from the assessment of certain lots and add to the assessment of other lots, where the action of the commissioner was afterwards ratified by the city council.

SAME—BENEFITS—SITUATION OF LOTS. Where lots are so situated as to leave an entrance from two streets it cannot be said that they do not abut upon the street at the rear of the houses as constructed thereon, or are not benefited by the improvement of such street.

SAME—ASSESSMENTS—APPORTIONMENT. Where the improvement of a street required the construction of retaining walls to support the lower side of a street, and retaining walls had been constructed by certain lot owners, making it unnecessary for the city to construct such walls in front of such lots, it is not error to find the value of such walls to be $30 per lot, and that such lots would be benefited that much less by the improvement than other lots similarly

[1]Reported in 82 Pac. 1092.

situated, and the amount thus deducted may be equitably distributed in a proper ratio upon such other lots in the district, as the council find are not assessed to their full share of the expense according to the benefits received.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 21, 1905, in favor of the defendant, after a hearing on the merits, confirming an assessment for local improvements. Affirmed.

T. L. Stiles and *Walter Loveday,* for appellants.

O. G. Ellis, J. J. Anderson, and *R. E. Evans,* for respondent.

HADLEY, J.—This is an appeal from a judgment of the superior court of Pierce county, confirming an assessment made by the city of Tacoma upon the appellants' lots, for the improvement of South C street in said city. The improvement extends from Division avenue, on the north, to South Seventh street, on the south, and consists of an asphalt roadway and concrete curb and sidewalks, together with some necessary retaining walls. The property involved in this appeal is located in block 7, which is bounded by said C street on the east. The block is also bounded on the north by Division avenue, on the west by St. Helens avenue, and on the south by South Second street. The lots in the block extend from C street on the east, to St. Helens avenue, on the west, there being no alley in the block.

At the northwest corner of the block, the point where St. Helens avenue intersects with Division avenue, the elevation of St. Helens avenue is about nineteen and five-tenths feet higher than C street. The difference in elevation from there to the southward gradually increases until, at the southwest corner of the block, at its intersection with South Second street, St. Helens avenue is about fifty and five-tenths feet higher than the level of C street. The northerly, or Division avenue, end of the block is approximately ninety-three feet wide, and from there it widens until at South Second street

it is about one hundred and eighty feet wide. The lots in the block descend from the St. Helens avenue front toward the C street front, and are accessible from both streets.

The city's counsel have argued to some extent that the city was empowered to include the lots of said block in an assessment district for the improvement of C street, and to charge the cost of said improvement to the lots according to the benefits received. This argument was occasioned by the fact that appellants' written objections to the assessment roll raised the question that, as C street is used largely by the general public as an avenue of communication between the lower business portions of the city and the higher residence portions thereof, it is not subject to improvement on the local assessment plan, and that the city itself should have borne all, or a large part, of the expense. Some remarks in appellants' opening brief also led respondent's counsel to believe that the same contention is being urged on this appeal; but in the reply brief appellants expressly disclaim any such intention, and say that the testimony, and their argument thereon, showing the situation of the streets and the use of them, was not for the purpose of urging that the property cannot be assessed at all, but to show, as clearly as possible, how appellants' lots are located and the reasons why they are not benefited by the improvement of C street, as lots are usually benefited by the improvement of a street in their vicinity. There is, therefore, no necessity for us to discuss the first point argued in respondent's brief. The points really urged by appellants upon this appeal are that the assessment exceeds the benefits to their property, and that it is not fair in comparison with that upon other property in the district. A further point is presented to the effect that at least the sum of $7.85 was illegally assessed against each of appellants' lots.

Certain errors are assigned to the effect that the court permitted opinion evidence of witnesses as to the gross amount of benefits accruing to the property from the improvement.

The following decisions of this court are cited in support of the claim that it was error to admit such testimony: *De Wald v. Ingle,* 31 Wash. 616, 72 Pac. 469; *Berg v. Humptulips Boom & River Imp. Co.,* 38 Wash. 342, 80 Pac. 528. The first case cited related to the opinion of the plaintiff, in an action for damages for personal injuries, as to the value of the pain and suffering endured. In the other case the plaintiff had testified, giving his opinion as to the gross amount of his damages suffered by injury to his cattle from flooding his lands. The personal injury case was clearly not one for opinion evidence, for the reason that the basis of the opinion had no definite standard. In the other case it was said that the damages claimed did not come within the allegations of tho complaint, and that it was apparent that at least some of the elements of damage considered by the witness could not be considered under any view of the law. The facts of neither case are analogous to those in the case at bar. The evidence received here related to the amount of benefits to real estate by reason of local improvements. The subject is but a phase of the question of value, since the benefits are measured by the increased value caused by the improvements. Speaking of the testimony affecting values of property, this court, in *Ingram v. Wishkah Boom Co.,* 35 Wash. 191, 77 Pac. 34, said:

"But value, when applied to property, is capable of at least approximate admeasurement, and is a subject on which a person can acquire a knowledge not possessed by the generality of mankind, and is held everywhere to be a proper subject for opinion or expert evidence. Indeed, values could hardly be proved in any other way, and it would practically be a denial of the right to recover for injuries to property, if witnesses were not permitted to give their opinion as to the amount a particular piece of property has depreciated from a given cause."

In the above case *De Wald v. Ingle, supra,* is distinguished as involving a different principle. In *Seattle etc. R. Co. v.*

Gilchrist, 4 Wash. 509, 30 Pac. 738, it was held that a witness could state his opinion as to the amount of depreciation in value of land on account of the appropriation of a right of way and the construction of a railroad. In 12 Am. & Eng. Ency. Law (2d ed.), 461, it is stated that the rule in some jurisdictions is for the witness to give his opinion as to the value of the property both before and after the injury, leaving the court or jury to make the deduction; while, in others, witnesses may state their opinions generally as to the amount of damages. As belonging to the latter class, citations are given from twelve states, including Washington, *Seattle etc. R. Co. v. Gilchrist, supra,* being cited from this state.

Applying the same principle, such evidence is admissible in this state to prove the value of benefits to real estate. Its accuracy may be tested by cross-examination. It is further urged, however, that the witnesses were not shown to be qualified to give opinions. We think the record shows sufficient qualification to permit them to testify. They certainly appear to have had some knowledge of the neighborhood, and they were all real estate men in the city of Tacoma. Witnesses who are not strictly experts but who have some knowledge of the value may testify. The fact that the knowledge is slight goes to the weight of their testimony rather than to its competency. 1 Elliott, Evidence, § 685.

Appellants' next contention is as follows: The commissioner of public works testified at the trial, and appellants called his attention to his action in making up a second assessment roll wherein he had deducted $30 for each of thirty-eight lots from the assessment shown upon the former roll, and distributed the amount upon the lots of appellants and others, by increasing the amounts against the latter to the extent of $7.85 per lot. After calling his attention to the above, appellants inquired of him as to his authority for so doing. The witness produced certain papers, which were identified but not then put in evidence. Afterwards, upon the request of respondent and over the objection of appellants,

they were admitted in evidence. It is claimed that the papers show no authority from the city to the commissioner of public works to make the change in the assessment. As we view the matter, it is immaterial what these papers contained bearing upon the question of authority, since the action of the commissioner in making a second roll was in all particulars ratified by the city council by its order confirming the roll, after due notice to appellants and all concerned. In view of such ratification, we do not find it necessary to examine the evidence criticized.

The next error claimed is that the court refused to reduce appellants' assessments to amounts equal to the benefits received by their lots from the improvement. Having reference now to the first assessment roll only, we are impressed from the whole record that a reasonable effort was made to equitably assess all the property according to the benefits received. Considering the peculiar situation of the lots in the district with reference to the street, an absolutely accurate and just result in all cases would perhaps be impossible to reach; but we are satisfied that we should not be able to arrive at a more just result. Some of the lots, as is true of most of appellants' lots, rise above the street; others are far below it, and still others are at a level with it. Under such conditions, it is exceedingly difficult to reach a result that is satisfactory to all concerned. We are satisfied that the lots of appellants are substantially benefited by the improvement. It is true, the houses are built fronting to the west on St. Helens avenue; at least, appellants regard that as the front side of their premises. Entrance is made directly from said street into the several houses. The houses are so built, however, that a lower or basement story is below St. Helens avenue and extends downward and backward toward C street. The lots are terraced toward the latter street, so that access is made to the houses directly from said street. The premises abut upon both streets, and are so situated and used that they may be said to have a front upon each street.

One street seems to be about as useful as the other in connection with the occupation of the several lots. Such a substantial improvement as that upon C street directly abutting upon appellants' lots must be a benefit to those lots, and we do not think we should say from the entire record before us that the several amounts assessed to appellants' lots are excessive, or that they are not fair in comparison with the assessment upon other lots in the district.

It is next argued that, in any event, the court erred in refusing to reduce the assessment upon each of appellants' lots to the extent of $7.85 per lot, which sum was added to them upon the second roll. Under this head it is first argued that the commissioner of public works had no power to change the assessments made upon the first roll except as he was ordered to do so by the city council. From what has been hereinbefore said, it will be seen that we regard the matter of the commissioner's authority in the premises as being established by the council's subsequent approval and ratification of his acts.

It is next contended that neither the council nor the commissioner nor both combined, had the power to make the changes which were made by the second roll. By that roll a reduction of $30 per lot from the amounts set forth in the first roll was made as to thirty-eight lots, aggregating $1,140 in all. Said sum was distributed upon other lots in the district, and the additional amount charged to each of appellants' lots was $7.85. The theory upon which this was done was that the plan of the improvement called for the construction of retaining walls or structures to support the lower side of the street and prevent it from sliding away by reason of the action of the elements. Such structures were built at places along the street. Certain lot owners on the lower side of the street had theretofore, at their own expense, constructed retaining devices, or had caused their lots to be filled in such a manner that additional structures, for the support of the street in front of such lots were deemed unnecessary,

and for that reason they were not built. In the opinion of the commissioner and council, these lot owners had, as aforesaid, already contributed to aid in the improvement of the street by rendering the erection of retaining structures unnecessary to the extent of their contributions. The value of such contributions to the district was estimated to be $30 per lot for each lot whose owner had thus contributed. It was therefore considered that the benefit of the improvement as constructed by the city was that much less to each of said lots than the amount originally determined, and that it did benefit each of the lots of appellants and others to the extent of $7.85 more than the amount first determined. It was proper to consider the improvement as a whole with reference to the benefits derived by the property in the district. It was the improvement and security of the continued thoroughfare that benefited the property, and the outlay of the owners of the lower lying lots, which contributed to change natural conditions so as to effect such end, was a benefit to other property in the district.

The structures erected, and fills made, by such lot owners may have been of incidental benefit to the lots themselves, but it neither follows that the entire resulting benefit attached to those lots alone, nor that other lots in the improvement district were not thereby benefited to the extent found by the commissioner and council. The relation of these lots and their owners to the improvement is similar to that of a lot and its owner where the latter has constructed a sidewalk in front of his lot. The expense of the sidewalk is a necessary part of the whole and completed improvement. It is of benefit to the other property in the district as well as to the single lot, and such lot owners are frequently allowed a reduction in their assessments by reason of such outlay. Such allowances, we understand, were made in the case at bar. Such a sidewalk becomes, in a sense, the property of the entire improvement district, and the expense thereof should be borne ratably by all property benefited, not exceeding the extent of

the value to the property. Such a result is effected when the owner of the lot is allowed the expense, and when the amount thereof is ratably charged to the lots benefited. So with the allowances made here. The expense of the retaining structures and fills resulted in benefit to the district generally, and it was proper that it should be generally borne by the property therein.

The fact that no part thereof may have been added to the assessment against certain lots upon the second roll does not establish that the assessment was not equitable and fair. Such other lots, in the judgment of the authorities, were already assessed their full and just share of the expense according to benefits received, while in their opinion the lots of appellants and others had not been so fully assessed upon the first roll. We are not convinced that their judgment in that regard was incorrect, and inasmuch as we believe they had the clear power to do as they did, we find no error pertaining to the second assessment roll.

Respondent in its brief seems to be under the impression that appellants insist that they should have similar allowances for their bulkheads and walls, on the theory that they retain the surface of their lots from falling into the street. Considerable space is devoted in the respondent's brief to an effort to distinguish these walls as being wholly for the benefit of the lots and as differing in their relation to the street from the structures and fills on the lower side, which retain the street itself from sliding down. In their reply brief, however, appellants expressly disclaim that they ask any such an allowance in this court. They simply assert that it was unfair to make the allowance to the lower lot owners without making a similar one to them; but seem to plant themselves upon the ground that such allowances are improper in either case. Inasmuch as appellants are not asking a readjustment of the assessment by way of allowance for their walls, it is therefore unnecessary that we examine respondent's argu-

ment that appellants' walls are not for the benefit of the street, as are those upon its lower side.

We believe the judgment below was as substantially right as any one this court could render, and with the conclusion that the judgment should be affirmed it is unnecessary that we discuss the constitutionality of the act of 1905, chapter 150, of the session laws of that year. Respondent claims the benefit of that act against any claims appellants make here, and appellants assert that it is unconstitutional. Inasmuch as our examination discloses no ground for the relief of the appellants upon the merits, when considered without regard to the statute, it becomes unnecessary to pass upon the constitutional question.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5228. Decided December 20, 1905.]

C. B. SMITH, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

APPEAL—ESTOPPEL TO ALLEGE ERROR—ACCCEPTING DEDUCTION OF BENEFITS FROM DAMAGES IN MUNICIPAL IMPROVEMENTS. Upon an appeal from the cancellation of an assessment of certain lots for local improvements, which the jury found were damaged $50 in excess of benefits, the city cannot be heard to assert that there was no authority for deducting the benefits from the damages in such a case, where the damages found were paid by the city, which thereby accepted the deduction of benefits made by the jury in assessing the damages.

Appeal from a judgment of the superior court for King county, Bell, J., entered March 28, 1904, in favor of the plaintiff, after a hearing on the merits, cancelling an assessment for local improvements. Affirmed.

1Reported in 82 Pac. 1098.

Mitchell Gilliam, Hugh A. Tait, Wm. Parmerlee (James B. Howe, of counsel), for appellant.

William Hickman Moore (A. J. Tennant, of counsel), for respondent.

Root, J.—The city of Seattle established an improvement district for the improvement of a portion of Pike and East Pike streets by regrading. Respondent owned a lot within said district. In the condemnation suit instituted by the city, the jury, after being instructed to deduct the amount of local and special benefits, found that respondent's property was damaged in the sum of $50, which amount the city thereupon paid from its general fund. Thereafter the city council prepared an assessment roll, levying upon the property specially benefited the cost of said improvement. Respondent's lot was placed upon said roll and assessed in the sum of $345.67. He appeared at the hearing over said roll before the city council, and objected to any assessment, for the reason that the jury had found his property to be damaged, over and above the amount of local and special benefits, which benefits had by said jury been deducted from the sum total of his damages. His objections were overruled by said council, and the assessment upon his lot confirmed. He then appealed to the superior court in and for King county, where proceedings were had terminating in a judgment cancelling said assessment upon respondent's property. From said judgment the city prosecutes this appeal.

The essence of appellant's contention seems to be contained in the following extract from its brief:

"Inasmuch as section 16, article 1, of the constitution, leaves the municipal corporation on the same footing as any other corporation, in every case save where a right of way is appropriated, we contend that, when the city undertakes to regrade a street, and thereby to damage abutting property, it has no right to have the benefit to the abutting property,

caused by the improvement, deducted from the damage to the abutting property, caused by the improvement."

Respondent answers this by insisting that the city cannot be heard to make this contention, for the reason that it accepted the benefit of this deduction before the jury, and paid only the $50 damages existing after making said deduction. Appellant argues that the trial court, in instructing the jury to deduct local and special benefits from respondent's damages, committed an error of law which respondent could have had corrected upon appeal, but that, not having appealed, he cannot now complain of said error, or urge it as justification for the trial court's action in annulling the assessment made thereafter by the city upon his lot. While appellant's argument is ingenious and, in a measure, plausible, we cannot believe its position tenable. Having, for the purpose of estimating respondent's damages, treated the statute as valid, and having profited by the deduction of benefits therein made against his damages, we cannot see how it can consistently urge unconstitutionality of the statute in a subsequent branch of the same proceeding. Were the validity of this statute challenged by a property owner whose benefits were but slightly in excess of his damages, in a case where others who, on account of their damages being slightly greater than their benefits were not assessed at all, and where others having no damage were assessed upon their benefits only in proportion as he was assessed upon his benefits, a serious constitutional question would be presented. But, upon the facts as revealed by this record, we feel constrained to hold that appellant cannot be permitted to urge this matter upon this appeal. *Daniels v. Tearney,* 102 U. S. 415, 26 L. Ed. 187; *Muldoon v. Seattle City R. Co.,* 10 Wash. 311, 38 Pac. 995, 45 Am. St. 787; *Kuhn v. Port Townsend,* 12 Wash. 605, 41 Pac. 923, 50 Am. St. 911, 29 L. R. A. 445; *Ferguson v. Landram,* 5 Bush.

230; 6 Am. & Eng. Ency. Law (2d ed.), 1090; Cooley, Const. Lim. (6th ed.), 196; Id. (7th ed.), p. 250 *et seq.*

The judgment appealed from is affirmed.

MOUNT, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5799. Decided December 20, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD ALLEN, *Appellant*.[1]

CRIMINAL LAW—PLEADING—PLEA OF GUILTY INDUCED BY UNFAIR MEANS—INFORMING ACCUSED OF HIS RIGHTS. A judgment and sentence entered upon a plea of guilty should be set aside and leave given to withdraw the plea, where it appears that the same was induced by promises that a light sentence would be given by the court, made by officers and detectives, who refused to permit the accused to communicate with his friends or an attorney, and where the accused claims to be innocent and the court did not explicitly inform him, upon arraignment, of his rights as required to do by statute.

Appeal from an order of the superior court for King county, Griffin, J., entered April 22, 1905, in favor of the plaintiff, denying the defendant's application to vacate the judgment and sentence entered upon a plea of guilty, and for leave to plead further. Reversed.

S. D. Wingate, for appellant.

Kenneth Mackintosh and *George F. Vanderveer*, for respondent.

PER CURIAM.—The appellant was informed against for the crime of robbery, and on arraignment pleaded guilty to the charge, and was sentenced to a term of ten years in the penitentiary. Before his sentence was carried into execution, he procured the services of counsel, and applied to the court for a vacation of the judgment and sentence pronounced

[1] Reported in 82 Pac. 1036.

against him, and for leave to withdraw his plea of guilty to the information, and to plead not guilty thereto. The application was supported by the affidavit of the applicant to the effect that he was not guilty of the crime charged against him, but was induced to plead guilty thereto by the officers having him in charge, and by the detectives who caused his arrest, who promised him that in case he did so plead guilty he would receive a light sentence from the court. He further alleged that the officers having him in charge would not permit him to communicate with his friends, nor with an attorney, but were constantly at him endeavoring to get him to enter a plea of guilty. He also alleged that a number of persons were brought into his place of confinement by the county officers for the purpose of identifying him as one of the persons connected with the robbery with which he was charged, but that none of such persons did so identify him, or in any way connect him with the commission of that crime.

The motion was based on the further fact that the record failed to show that the accused was informed of his right to counsel at the time he was arraigned; the record, however, was subsequently amended so as to show that, before he had entered his plea, he was informed by the court of his right to the assistance of counsel and that the court would assign him counsel if he so desired. There was no denial of the matters set out in the affidavit. The application was brought on for hearing before the court, and denied on April 22, 1905, whereupon this appeal was taken.

It is our judgment that the application should have been granted. It may be true that the conduct of the undersheriffs, as shown by the affidavit, was not, of itself, sufficient to warrant this court in reviewing the discretion of the trial court; but the record makes it plain that the court itself did not do its full duty to the accused, and these facts, taken together, lead us to the conclusion that a trial before a jury should be awarded him. The statute makes it the imperative duty of the court, when a defendant is brought before it for

arraignment, to inform him before he is arraigned that it is his right to have counsel, to ask him if he desires the aid of counsel, and if it appears that he does desire such aid, and if he is unable to employ such aid by reason of poverty, to assign him counsel. Had the court been thus explicit with the defendant here, he might have been put upon his guard against the wiles of the officers having access to him, and not have been led into the belief that these officers had the power to control the length of the sentence the court would inflict upon him. If the defendant is guilty, it ought not to be difficult for the state to prove it to the satisfaction of a jury. But if it be true that the state is without evidence against him, as his affidavit suggests, it is better that he go free than that he be convicted without due regard to the forms of law, and by practices that are at best very questionable.

The order appealed from is reversed, and the cause remanded, with instructions to vacate the judgment and sentence, and permit the defendant to plead further to the information.

[No. 5805. Decided December 20, 1905.]

KATIE DAFFRON, *Respondent*, v. MAJESTIC LAUNDRY COMPANY, *Appellant*.[1]

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42 235

MASTER AND SERVANT—NEGLIGENCE—DANGEROUS MACHINERY—LAUNDRY MANGLE — GUARD — SUFFICIENCY — UNEXPECTED DANGERS. There is not sufficient evidence of failure to provide a proper guard for a mangle, or to support a verdict for injuries received by the operator, where it appears from the testimony of the plaintiff that the machine had a guard, and the defendant had made a *bona fide* attempt to comply with the factory act, that the plaintiff's hand became entangled in apron strings and was forcibly drawn over the top of the guard, and that such an accident was a most unusual occurrence, and was not anticipated by the plaintiff, an experienced operator, and could not have been reasonably anticipated by the defendant.

[1]Reported in 82 Pac. 1089.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered April 17, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a mangle operator in a laundry. Reversed.

John P. Hartman, for appellant.

P. D. Hughes and *Fenley Bryan,* for respondent.

ROOT, J.—In the superior court respondent had a verdict and judgment against appellant in the sum of $2,800, from which judgment this appeal is taken. The admitted facts, and those established by the evidence on behalf of respondent and by that portion of appellant's evidence which was undisputed, showed the following facts: Respondent was injured by having her left hand caught and burned between the feed roll and cylinder of a "mangle" upon which she was working as "head feeder" in appellant's laundry; that said mangle consists of a long, hollow cylinder, about two feet in diameter and heated from within, and several small rolls and other apparatus; that its purpose is to smooth or "iron" clothes after being washed; that the clothes are inserted between the cylinder and a feed roll on the side where the operator (known as the "head feeder") stands—said cylinder revolving toward said operator at a speed of seven or eight revolutions per minute; that the clothes pass around on the cylinder one or more times, and are removed by an operator, known as a "folder," who stands on the opposite side of the mangle from the head feeder; that the mangle upon which respondent was injured is a machine of standard make and in common use; that in front of the head feeder and extending parallel with the cylinder and feed roll is a guard which is so placed for the purpose of preventing the hands of the operator from being carried between the rolls, as she pushes the clothes into the mangle; that this guard was round, and about an inch or two in diameter, and so placed as to revolve

when the hand passed along over it; that respondent had worked for four years in laundries, and in some where they had the same kind of mangle as that upon which she was injured; that she was an experienced "mangler," and had been operating this particular mangle for two weeks immediately preceding the injury; that, as head feeder, she was in charge of the machine and had supervision over three other operatives who worked in connection therewith; that the defects in the apparatus alleged in the complaint were all open, apparent, and discernible to any one experienced in the operation of a mangle; that respondent knew all about its construction and condition, and knew of the ordinary dangers to be apprehended in working thereupon; that she had never made any complaint to appellant about the mangle, or anything, except in one instance she spoke to appellant's superintendent of something which is not shown to have any connection with the cause of the injury in question, and except that one of her witnesses says that respondent, when she first came to the laundry, told the superintendent that the mangle did not look good to her; that the mangle had been in use five or more years; that respondent's hand was caught between the feed roll and cylinder and held until extricated by the superintendent and other employees; that she was, at the time, putting through the mangle some bartender aprons with long strings; that her hand did not go between the guard and the feed roll where the clothes are put in, but went over the top of the guard and between the feed roll and cylinder, where it was caught and badly burned.

Respondent claims that the strings upon the aprons, after going around the cylinder, were in some manner thrown over, so as to fall upon and entangle her hand, and forcibly pull it across the top of the guard, and then down back thereof and into the place where injured; that she did not know that there was danger of this kind of an injury. Respondent bases her right to recover upon the contention that the guard was not a "proper" guard, within the meaning of the factory

act of 1903. From these facts it will be readily seen that, unless there be some statute or decision to the contrary, this is a clear case of assumed risk wherein respondent could not recover. *Bier v. Hosford,* 35 Wash. 544, 77 Pac. 867; *French v. First Ave. R. Co.,* 24 Wash. 83, 63 Pac. 1108.

But it is urged by respondent that the factory act of 1903, as interpreted by the decision of this court in the case of *Hall v. West & Slade Mill Co.,* 39 Wash. 447, 81 Pac. 915, prevents appellant from availing itself of the defense of assumed risk. The writer dissented from that decision, but must now accept it as binding in this case. The holding there was that an employer, guilty of violating the factory act, could not plead or avail himself of the defense of assumed risk in an action by an employee for injuries caused by reason of such violation. In that case the plaintiff was injured by being caught upon a set screw on a revolving shaft which the mill company had not covered or attempted to guard or protect. The court held that, as the defendant company was guilty of violating a penal statute, it was deprived of the defense of assumed risk, even though the statute did not expressly so state. In the case at bar the defendant company had made a *bona fide* effort to comply with this statute.

Respondent contends that it was not a "proper" guard, for the reason that it did not prevent the injury while some other kind of a guard would have done so. It was not shown that any particular kind of guard was recognized or accepted generally as being essential to meet the requirements of the statute. But it was shown by respondent's witnesses that there are several different kinds of guards in use. No particular kind is required by the statute or any recognized custom or authority. This being true, what would be the duty of a laundry owner in the premises? How could he tell what would be regarded as a "proper" guard, within the meaning of this statute? He had no standard to go by. He could only rely upon his own experience, observation, and judgment. Before appellant can be deprived of the defense of

assumed risk, it must affirmatively appear that it violated this factory act in not having a proper guard. It is only required to provide guards sufficient to protect against such dangers as reasonably intelligent and experienced laundrymen would anticipate.

Respondent says the accident occurred by reason of the loose strings of some aprons being thrown over her hand, and entangling it or her fingers, so as to pull her hand in where it was hurt. This version is flatly contradicted by the evidence of several who helped take her hand out, and who testify that the apron strings were not about her hand or fingers. But, accepting her story as correct, it would be a most remarkable occurrence. No witness testified to having ever heard of such an accident occurring in such a manner before. As a matter of physics, it is well nigh incredible that her hand could have been caught by the apron strings and drawn in as related by her. She testifies that she never anticipated such a danger. If she, an expert at the work, would not expect or foresee such an accident, why should the owner? As an experienced operator of such a machine, she could foresee dangers thereabout as well as the owner or any one else. If it was not negligence for her not to anticipate such an accident, how can it be said to have been negligence for the owner not to have foreseen it? This guard was for the purpose of keeping the operator's hands from going between the feed roll and cylinder as she pushed the clothes therein. It answered this purpose perfectly. Respondent did not get her hand caught in this way, but in an unusual and unexpected manner. The guard was not put on to protect against flying apron strings that might lasso a feeder's hand and pull it up over and back of the guard and then down between the roll and cylinder. Evidently no mangle-maker or owner ever foresaw such an accident, or imagined a necessity for a guard against such an occurrence. The law is well settled that, where an employer places a guard sufficient to protect against all dangers reasonably to be anticipated, he

is not guilty of negligence because the guard fails to protect against an unforeseen danger against which it was not intended as a protection. *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98.

The judgment of the honorable superior court is reversed, with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, FULLERTON, RUDKIN, HADLEY, and CROW, JJ., concur.

[No. 5761. Decided December 20, 1905.]

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O. A. THOMPSON *et al., Respondents,* v. H. M. BENSON *et al., Appellants.*[1]

APPEAL AND ERROR—BRIEFS—STRIKING FOR FAILURE TO CONTAIN FINDINGS. Appellants' brief on appeal will not be struck out for failure to print the findings of fact when they are thereafter printed in the reply brief.

INJUNCTIONS—ACTION ON BOND—ATTORNEYS FEES IN PROSECUTING UNSUCCESSFUL ATTEMPT TO DISSOLVE—LIABILITY. Attorney's fees paid in an unsuccessful attempt to dissolve an injunction cannot be recovered in an action upon the injunction bond, where the action of the court in refusing to dissolve the injunction was affirmed on appeal, even though the plaintiff afterwards voluntarily dismissed the injunction.

SAME—ADMISSIONS—VOLUNTARY DISMISSAL. The voluntary dismissal of an injunction does not necessarily admit that it was wrongfully sued out.

Appeal from a judgment of the superior court for Lincoln county, Chapman, J., entered December 19, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on an injunction bond. Reversed.

H. A. P. Myers and *Merritt & Merritt,* for appellants.

Martin & Grant, for respondents.

[1] Reported in 82 Pac. 1040.

DUNBAR, J.—This is an action on an injunction bond. An action was pending between Thompson and wife and Benson to determine the ownership of a certain tract of land. On February 14, 1902, a judgment was entered decreeing that Thompson and wife, plaintiffs in this action, were the owners of said land. This judgment was afterwards approved by this court. *Thompson v. Benson,* 29 Wash. 735, 70 Pac. 1135. In such proceedings Benson executed the injunction bond to restrain Thompson and wife from disposing of a crop of wheat raised on the land in dispute. After the commencement of the injunction proceedings, Thompson and wife moved to dissolve said injunction, which motion was denied by the court, and appeal was taken from the order of the court, and said order was affirmed by this court in the case of *Benson v. Thompson,* 29 Wash, 735, 70 Pac. 1134. The present action is brought to recover damages growing out of the injunction. It appears by the findings of the court that the judgment which was allowed was entirely for attorney's fees in the prosecution of the motion we have before referred to, to dissolve the injunction. From the judgment and decree for said attorney's fees, this appeal is taken.

Respondents move to strike appellants' brief from the files of this court, for the reason that the findings of fact are not printed therein. This objection has been obviated by the printing of the findings of fact and conclusions of law in a reply brief filed by the appellants. There seems to be no merit in the motion to strike the statement of facts.

The question involved is simply, can the respondents recover on the injunction bond for attorney's fees alleged to have been paid in an unsuccessful attempt to dissolve the injunction? We think the court erred in giving judgment for such attorney's fees. It is undoubtedly the general rule that, where an injunction has been wrongfully sued out, a reasonable amount of compensation paid for counsel fees in procuring the dissolution of such injunction may be recovered

in an action for damages; and Mr. High, in his work on Injunctions (3rd ed.), § 1886, gives as a reason for the rule that the allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that the party has been compelled to employ aid in ridding himself of an unjust restriction which has been placed upon him by the action of the plaintiff. But the reason of the rule would fail in this case, for the respondents failed to establish the fact that the injunction was an unjust restriction. In fact, this court, in affirming the action of the lower court in refusing to dissolve the injunction, especially held that the court was justified in not dissolving the same. It is true that the appellant Benson afterwards voluntarily dismissed the injunction proceedings; but it does not follow, as is argued by the respondents, that that was an admission that the injunction should not originally have been granted. The object of the injunction, no doubt, was to hold the property *in statu quo* during the litigation. The conditions may have so changed before the voluntary dissolution that the injunction was no longer necessary. In any event, that the injunction was properly issued had been determined by a final adjudication. It was held in *Donahue v. Johnson,* 9 Wash. 187, 37 Pac. 322, that attorney's fees are not recoverable in an action on an injunction bond, where no motion for the dissolution of the injunction is made, and it is allowed to stand until defeated by a trial upon the merits. The condition of this case, after the motion for the dissolution had failed, was exactly as though no motion had been made. Certainly the respondents could not place themselves in any better light and recover any more costs from the appellants by reason of the fact that they had made a motion for relief which they were not entitled to, and that they were not entitled to such relief was a question which we have seen had been adjudicated.

We have examined the cases cited by the respondents, but do not think they sustain their contention, and under author-

ity and reason, this judgment cannot be sustained. It will therefore be reversed.

MOUNT, C. J., ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5880. Decided December 20, 1905.]

JENNIE RICE *et al., Respondents,* v. JAMES R. PERSHALL, *Appellant.*[1]

HIGHWAYS—PRESCRIPTION—USER—FINDINGS—SUFFICIENCY. In a suit to restrain a trespass, justified on the ground that the *locus in quo* was a public highway, a finding that a road "during the last fourteen years has been traveled by the public generally during all of said time, and known by the people in the vicinity as a public highway" is not sufficient to establish a highway by prescription, in the absence of any showing as to the character of the travel, the nature of the country, the number of people using it, or whether the use was permissive or otherwise.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 18, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to enjoin trespassing. Affirmed.

Belt & Powell, for appellant.

George W. Shaefer, for respondents.

DUNBAR, J.—This action was brought to restrain defendant from trespassing upon lots 2 and 3, of section 20, township 26, range 42 E., W. M., Spokane county, the complaint alleging, that plaintiffs held said lots under a contract of purchase; that the lots were cultivated grounds, and inclosed by a fence; that defendant unlawfully tore down said fence and drove upon said premises with a wagon and team; that defendant threatens to continue to trespass thereon, and that

[1]Reported in 82 Pac. 1038.

the crops growing thereon are in danger of destruction, etc.; and prays for an injunction and damages. The defendant denied all the allegations of the complaint, and affirmatively alleged that, for more than fourteen years prior to the acts complained of, a public highway had existed over said lots; that he was traveling over said highway and, finding a wire fence across it, cut the wire and drove over said highway, the same being the acts complained of in the complaint.

The reply of the plaintiffs denied all the affirmative matter of the answer, and set up matter by way of estoppel, to the effect that in March, 1904, and divers times thereafter, the defendant made application to the plaintiffs for a private way across said lands, and thereby admitted the superior right and title of plaintiffs in the said land and the ways and road thereon, admitting thereby that he had no right, title, or interest therein; and, further, that defendant had made an application to the board of county commissioners of Spokane county, state of Washington, and filed a bond with said board for a public road on and across plaintiffs' land above described, and that such proceedings are now pending before such board. A trial was had on the 18th day of May, 1905, and the court made and entered findings of fact and conclusions of law as follows:

"(1) That for about two years last past the plaintiffs have been and now are the owners of the equitable title in lots two and three, section twenty, township twenty-six, north, range forty-two, E., W. M., in Spokane county, Washington, and during said time have been in possession thereof.

"(2) That for more than fourteen years last past the defendants have been and now are the owners of lots two and five, section twenty-one, township twenty-six, north, range forty-two, E., W. M., and for more than fourteen years last past lived upon and occupied said premises as a home.

"(3) That for more than fourteen years last past said defendants have traveled along a road leading from what is known as the Merchant Road, about a mile south of their house, upon their premises, in a northerly direction along and over said lots 2 and 5, said section 21, and thence over

said lot 3, said section 20, which connected with and into what is known as the Lyle Road, running in a northwesterly and southerly direction and crossing what is known as the Lyle bridge, and thence leading towards the city of Spokane.

"(4) That said road leading from said Merchant Road to said Lyle Road during the last fourteen years has been traveled by the public generally during all of said time known by the people living in that vicinity as a public road.

"(5) That said lots 2 and 3 during all of said time, until same were purchased by said plaintiffs, as above found, were owned and during a portion of said time occupied by one Anderson, who lived at a point about twenty rods north of where said Pershall Road led into said Lyle Road, and that said Anderson during all of said time knew that same was being used as a public road and never made any objection thereto, and no objection was ever made to the use of said Pershall Road until some time during the month of May, 1904, when the plaintiffs ploughed up a portion of said road and fenced the same in at a point where it leads from said lot 2, section 21, to said lot 3, said section 20.

"(6) That about four years ago what was known as the Lyle bridge was lowered and the Lyle Road was changed so as to go a few rods further north, and the grade cut down. That during said four years said defendant has traveled over the ground leading from the point where said Pershall Road intersects said Lyle Road about 300 feet north, in order to connect with said Lyle Road, and thence cross said bridge, said 300 feet having been used during said four years by the public generally without objection by the owners thereof until some time during the month of May, 1904, when said plaintiffs placed a fence across the same and forbade the defendant to travel across same.

"(7) That the said Pershall Road, traveled until fenced and ploughed during the year 1904, as hereinbefore found, crossed that portion of the Anderson land which was not improved by fence or cultivation. That said Anderson had fenced a portion of said lot 2 during the time that he occupied the same.

"As a conclusion of law from the foregoing facts the court finds that the plaintiffs are entitled to judgment against the defendant as follows: (1) That said Pershall Road leading from what is known as the Merchant Road to what is known

as the Lyle Road is not a public highway, that the public has not acquired prescriptive rights by use of said road, and there has been no adverse use established. (2) That the defendant be perpetually enjoined from entering and trespassing in any way on said road and on lots two and three, section twenty, township twenty-six, range forty-two, Spokane county, Washington. (3) That plaintiffs have sustained damage in the sum of forty dollars, and their costs and disbursements in this action against this defendant."

Upon these findings and conclusions, a decree was made and entered, perpetually enjoining defendant from entering and trespassing in any way on said land, and awarding damages against defendant for $40, and for costs. A motion for a new trial was made and denied. This appeal is from said decree and order denying a new trial, and the sole assignment of error is that the conclusions of law are not justified by the findings of fact.

We think this judgment must be affirmed, under the rule announced by this court in *Watson v. County Commissioners,* 38 Wash. 662, 80 Pac. 201. The only pertinent finding here is, "that said road leading from said Merchant Road to said Lyle Road during the last fourteen years has been traveled by the public generally and during all of said time known by the people living in that vicinity as a public road." We think this is not sufficient to establish a road by prescription. There is nothing in the findings of fact to indicate what kind of a country this land was located in, whether it was a prairie country sparsely settled, whether the road was a highway which was traveled by any great number of people, or whether the public, which is spoken of, consisted of a few people in the neighborhood of the road. Neither is there any showing that there had been any work done on this road by the public, or any other notice to the respondents than the mere fact that the public had traveled the road; or that there had been any attempt to travel the road otherwise than by permission of the respondents. No statement of facts is brought here by which the circumstances surrounding the case can be de-

termined, and there is not sufficient in the findings to rebut the presumption that the judgment was properly rendered. We do not wish to be understood as saying that a road cannot under any circumstances be established by prescription, but we think that the showing here, as indicated by the findings, is not sufficient.

The judgment is therefore affirmed.

MOUNT, C. J., ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5718. Decided December 20, 1905.]

H. E. GRITMAN, *Respondent*, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, *Appellant*.[1]

PLEADINGS—AMENDMENTS TO CONFORM TO PROOF—SURPRISE. It is proper to allow an amendment to the complaint to conform to the proof that an architect's certificate was duly given, although it was not pleaded, where it appears that on a former trial the same was offered and received in evidence, and that on the same trial the defendant offered evidence in rebuttal thereof, and could not have been surprised; especially where the order allowing the amendment recites that the objections to the evidence were not argued until after the parties had introduced their evidence and rested, and no improper advantage was obtained.

INDEMNITY — CONTRACTOR'S BOND — DEFENSES — CONTRACTOR AS AGENT FOR DELIVERY. Where a surety company delivers a bond to a contractor for the purpose of closing a building contract, the contractor is made the agent of the surety for the purpose of delivering the bond, and the surety cannot claim that the bond was not given upon the contract for which it was delivered, if there was nothing on the face of the bond which would tend to put the owner upon inquiry.

Appeal from a judgment of the superior court for Adams county, Kennan, J., entered October 29, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the

[1]Reported in 83 Pac. 6.

court without a jury, in an action on a building contractor's bond. Affirmed.

Merritt & Merritt and *Crow & Williams,* for appellant.

O. R. Holcomb and *Post, Avery & Higgins,* for respondent.

DUNBAR, J.—This is an action by respondent, who was the owner, against the contractor and appellant, surety on the contractor's bond, for damage on account of the default of the contractor. The complaint alleged, the execution of the contract; that the contractor had entered upon the performance of the contract and had, during the continuance thereof, abandoned the work; that he had paid divers sums upon the estimate of the architects, and was compelled to pay certain judgments upon materialmen's and laborers' liens, and certain other amounts to complete the building; that the contractor was to pay $10 per day for the time after the 1st day of August; that the building was not completed for thirty-six days thereafter; and that altogether he was damaged in the total sum of $2,787.44. It was not alleged in the complaint that the accounts for expenses incurred by the owner were audited and certified by the architects, as provided by article 5 of the contract.

Appellant demurred to the complaint on general grounds. The demurrer was overruled, issues were joined, and an affirmative defense set up that the contract under which the building was erected was not the contract under which the bond was given; that the judgments upon the mechanics' liens were erroneous and void, etc. The respondent replied, denying the affirmative answer. The case was tried in October by a jury, resulting in a verdict for respondent. The verdict was afterwards set aside and a new trial granted. The second trial was by the court. During the first trial the respondent offered in evidence a certificate of the architects by which the correctness of the expenses was certified. To this offer appellant objected on the ground that it was ir-

relevant, incompetent, and immaterial, and there were no allegations in the complaint to justify it. The certificate was admitted in part and excluded in part, the part excluded being held to be improperly in the certificate.

After the new trial was granted, the appellant applied for, and was granted, leave to file an amended answer. Respondent asked, and was granted, leave to amend his complaint in certain immaterial particulars, but no effort was made to amend by alleging that the architects had audited and certified as required by the contract. When the case came on for trial the second time, on the 19th day of February, 1904, it was stipulated that the testimony taken at the former trial should be extended and transcribed, and the parties should offer any additional testimony they desired and interpose additional objections, and the court should consider all testimony taken and objections made at both trials. Again respondent offered the certificate of the architects upon the expenses incurred after the default of the contractor. Objection was again made, upon the same ground as in the former trial, and upon the additional ground that it was not in the manner and form contemplated in the contract. In April the case came on for argument upon the objections to testimony and upon the merits. On the 28th day of October, the court signed an order permitting respondent to amend his complaint and, at the same session, signed the findings of fact, conclusions of law, and judgment upon the amended complaint, to all of which appellant objected, and it was allowed an exception. On October 29, the order granting leave to amend, the amended complaint, the findings, conclusions, and judgment were filed with the clerk.

The appellant's contention is that the court erred in allowing the amendment to the complaint in relation to the architects' certificate at the time it was made. Conceding, without deciding, that the complaint was not broad enough to admit the certificate of the architects, the trial court did not

commit error in granting the motion to make the pleadings conform to the evidence; and if it had not done so, this court, under the liberal provisions of the statutes and its own uniform decisions, would consider the pleadings amended to conform to the facts proven and necessary to be proven, when such amendment would be in furtherance of justice and when neither party would be in any wise misled or prejudiced thereby. A very earnest appeal has been made by appellant, by both brief and oral argument, on that question, and it is insisted that injustice has been done it by allowing this amendment. Counsel differ widely as to what actually occurred during the trial of the case, tending to show whether or not objection was made to the introduction of the evidence of the architects' certificate for the special reason that it was not pleaded. An examination of the record shows that there is room for contention on this proposition. However, the more material question is, has the appellant been in any way surprised or misled by the action of the court in allowing the amendment? Upon this question the following excerpt from the language of the court, in passing upon the motion to amend, has great weight. The court, in making its ruling on the motion to amend, among other things, said:

"After the certificate was received in evidence by the court, counsel for defendant offered evidence tending to impeach said certificate, all of which was admitted, considered and received by the court; that the court is of the opinion that the allegations of the complaint were broad enough to entitle the plaintiff to introduce in evidence said certificate, and inasmuch as defendants were permitted to introduce evidence for the purpose of impeaching or destroying the force and effect of said certificate the same as if an issue had been made thereon by the answer as well as by the complaint, and as the point of insufficiency of the complaint in this respect with other objections was not argued before the court until several weeks after both parties had introduced their evidence and rested and agreed that the case should be argued after the evidence had been transcribed by the stenographer, and

the point as to the sufficiency of the complaint is purely technical and no improper advantage could be obtained by the plaintiff and no harm done to defendant by considering the complaint as amended to accord with the proofs, now therefore, it is ordered, upon motion of plaintiff, that said complaint be treated as amended with the proofs in the above respect, and further that the plaintiff may, if he desires, file amended complaint as of the time of the second trial of this cause, to wit, February 19, 1904; said amended complaint to contain an allegation as to the execution and delivery by the architects of said certificate and estimate, auditing said account above referred to, and also that the answer of the defendant shall likewise be deemed amended to accord with the proofs so that all testimony and evidence introduced by defendant tending to impeach or destroy the effect of said certificate shall be considered properly in evidence and within the issues in said cause."

Not only was this certificate introduced in evidence on the first trial, so that the appellant cannot plead surprise or want of opportunity to prepare controverting testimony, but upon rebuttal the appellant affirmatively proved the giving of the certificate, and attempted to show that it was given without sufficient investigation. This would probably not estop the appellant from urging the inadmissibility of the testimony offered by the respondent, but it goes to show lack of surprise or injury by reason of the order of the court allowing the amendment to the complaint. The whole record brings the case squarely within the rule announced by this court in *Green v. Tidball,* 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879, where we said:

"The statute directs us to disregard any error or defect which does not affect a substantial right of the adverse party, (§ 4957), and to determine all causes upon the merits thereof, disregarding all technicalities, and to consider all amendments which could have been made as made (§ 6535). When, therefore, a cause has been tried upon its merits, as if upon pleadings sufficient in form and substance, in which the com-

plaining party has not been misled, and has had full opportunity to present his case, some substantial wrong, some failure on the part of his adversary to aver or prove a material matter necessary on his part to be averred and proven in order to entitle him to recover, must be shown, before this court is warranted in reversing and remanding a cause for a new trial. A mere defect in pleading is not such a cause. It must not only be defective, but must have operated to the substantial injury of the complainant, before that result can follow."

The same reasoning would prevent this court from dismissing the case after trial, even though the demurrer should have been sustained in the first instance. See, also, *Kinkead v. Holmes & Bull Furniture Co.*, 24 Wash. 216, 64 Pac. 157.

The next contention, that the contract sued on was not the contract upon which the bond was given, cannot be sustained. It is not material that the architect happened to be the scrivener who drew the contract. He had no authority or power whatever over the contract or over the parties to the contract, and was in no particular, as shown by the record, representing the respondent. The appellant, the bond company, delivered the bond to Covert, the contractor, for the purpose of closing the transaction with the respondent, and thereby constituted him its agent; and if there was nothing on the face of the bond which would tend to put respondent on inquiry, the appellant is bound. *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. 880, 19 L. R. A. 500; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446; *Risse v. Hopkins Planing Mill Co.*, 55 Kan. 518, 40 Pac. 904; *Sweeney v. Aetna Indemnity Co.*, 34 Wash. 126, 74 Pac. 1057.

We are satisfied that the lien judgments, even as against direct attack, were properly incorporated in the judgment; but such judgments not having been moved against directly, but being assailed in a collateral proceeding, nothing is shown which affects their validity.

We think the findings of the court were justified by the testimony, that no prejudicial error of law was committed, and that therefore the judgment should be affirmed, and it is so ordered.

MOUNT, C. J., RUDKIN, FULLERTON, and HADLEY, JJ., concur.

ROOT, J., concurs in the result.

CROW, J., having been of counsel, took no part.

[No. 5863. Decided December 20, 1905.]

SAM ANDERSON, *Appellant,* v COLUMBIA IMPROVEMENT COMPANY *et al., Respondents.*[1]

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS. There are no abnormal risks in the danger from falling limbs in the work of falling trees which call for instructions thereon, but the risks are open and apparent and assumed by an adult employee of ordinary intelligence who had been engaged in the work for a week, although he had had no previous experience with a tree of the same size.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 6, 1905, upon the verdict of a jury rendered in favor of the defendants, by direction of the court, dismissing an action for injuries sustained by an employee in falling a tree. Affirmed.

Govnor Teats, for appellant.

Harvey L. Johnson and *F. S. Blattner,* for respondents.

MOUNT, C. J.—Action for personal injuries. At the trial of the case, when the plaintiff had introduced all his evidence, the lower court directed a verdict on motion of the defendants. Plaintiff appeals.

The facts are substantially as follows: During the summer of 1903, the respondents were constructing an electric

[1]Reported in 82 Pac. 1037.

power and light transmission line in Pierce county. About the 1st of July, appellant was employed as a common laborer in clearing the right of way of logs, brush, and timber along respondents' line. Appellant came to this country from Norway in June of 1903. At the time he was employed by respondents, he was unable to speak the English language. A countryman, who was a friend and engaged in the same employment with appellant, obtained work for appellant, and told him what he was to do. After the appellant had been employed for about a month, rolling logs, piling brush, digging holes for poles, and assisting to set the poles, he was sent with a fellow laborer to cut brush and small trees upon the right of way. He had been engaged at this work for about a week, when he and his associate cut down a fir tree about one foot in diameter at the base and about one hundred and thirty feet tall. This tree was dead and contained no limbs. When it was cut off at the base, it fell against another tree standing near by, and a limb was broken which fell upon appellant, severely injuring his arm. No instructions had been given appellant as to the danger connected with such work.

The complaint alleged that the work was dangerous, and that respondents were negligent in not informing appellant thereof. The answer pleaded contributory negligence and assumption of risk. Appellant testified that, at the time he was injured, he was looking at the bottom of the tree which was falling and not at the top, and for that reason did not see the limb which struck him.

Appellant invokes the rule laid down in numerous authorities, to the effect that,

"A master is *prima facie* bound to instruct a servant as to all risks which are abnormal or extraordinary and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself." 1 Labatt, Master & Servant, § 240.

See, also, 4 Thompson, Commentaries on Law of Negligence, § 4055; Wood, Master & Servant (2d ed.), § 354.

There can be no doubt but that this rule is correct, but it has no application to the facts of this case. There were no abnormal or extraordinary risks or dangers about the work which the appellant was doing which were not as open and comprehensible to appellant as to respondents. While the servant was a foreigner, unable to speak the English language, and while he had had no previous experience in cutting down trees the size of the one which caused the injury, he was a young man about twenty years of age, possessed of at least ordinary intelligence, and a fair education which he received in the old country, and he must have known that, when he cut down a tree one hundred and thirty feet long and one foot in diameter at the base, it might fall upon him, and that such tree was liable to break limbs in its descent against other trees standing near by, and that these limbs would injure him if he stood under them. Under such surroundings, he must appreciate the dangers without being specially informed thereof. 4 Thompson, Commentaries on Law of Negligence, § 4061.

Such dangers are necessarily incident to his employment. They are open and obvious to ordinary inspection. They are made by the progress of the work, and the master is not required to stand by and inform him of things which he may see by merely glancing, or using only ordinary care for his own safety. The injury in this case clearly resulted from one of the ordinary and open risks of his employment. He therefore assumed the risk, and the master is not liable.

The judgment is affirmed.

DUNBAR, ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5867. Decided December 20, 1905.]

WILLIAM CLUTTER, *as Executor of the Last Will and Testament of H. W. McNeel, Deceased, et al., Appellants,* v. N. L. STRANGE *et al., Respondents.*[1]

REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE—SUFFICIENCY. A claim that there was a mistake in a contract agreeing to convey a certain number of acres of a tract of land, in not describing a certain tract, entitling a party to a reformation, is not sustained where the evidence of one witness to that effect is contradicted by the other party and by the attorney who drew up the contract.

VENDOR AND PURCHASER — CONTRACTS — CONSTRUCTION — CONDITIONAL OR ABSOLUTE SALE. A contract whereby the defendants undertook to redeem the land of another from certain mortgage and judgment liens, furnish him a place to live, pay him an annuity, and reconvey a quarter section thereof after full reimbursement for their expenses, amounts to an absolute and not a conditional sale to the defendants, except as to the part to be reconveyed, and that part only is held in trust for the former owner.

SAME—RESCISSION BY PURCHASER—BREACH—FRAUD—FAILURE TO KEEP ACCOUNTS—EFFECT. Where the grantees of certain premises undertook to redeem the same from mortgage and other liens, and to reconvey a part, after full reimbursement for their advances out of the rents, issues and profits of the land, the foreclosure of the mortgage in the interest of the grantees for the purpose, as claimed, of perfecting title, will not be presumed fraudulent as to the owner so as to work a forfeiture of the contract, nor will the failure to keep account of the rents, issues and profits have such effect.

SAME—FAILURE OF TITLE—EXCUSE FOR PERFORMANCE. Grantees who undertake to recover a portion of the premises conveyed to them, upon reimbursement for advances made, are not freed from their obligation to reconvey by reason of a partial failure of the title of their grantor, where they acquired the title to such part at one-half its market value, which sum, at most, they could claim as an additional indebtedness against the property.

ACCOUNTING—CONTRACTS—ADVANCEMENTS—RENTS AND PROFITS OF LAND—ITEMS CHARGEABLE. Where premises were conveyed to the defendants, who undertook to redeem the same from mortgage and other liens, and to reconvey a part after full reimbursement out of the rents, issues and profits, the defendants are not entitled upon an

[1]Reported in 82 Pac. 1028.

accounting to credit for taxes paid or improvements made on their portion of the land, after they took possession, nor for the expense of foreclosing a mortgage on the premises incurred to enable them to gain possession of other lands; nor could they farm out the land to themselves at a profit and credit the former owner with only one-third of the crop, since they were entitled only to actual expenses.

SAME—FAILURE TO KEEP ACCOUNTS. Where grantees in a conveyance of lands, agreed to reconvey a portion of the premises upon being fully reimbursed for advances out of the net rents, issues and profits of the land, they are bound to keep proper accounts, and must be held to be fully reimbursed where no accurate accounts were kept for a period of years, except such as could be prepared from disconnected data and memory, showing many discrepancies and errors.

Cross-Appeals from a judgment of the superior court for Whitman county, Chester F. Miller, J., entered April 29, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in action on contract. Reversed.

James A. Williams and *Denton M. Crow,* for appellants.

Sullivan, Nuzum & Nuzum, for respondents.

RUDKIN, J.—On the 27th day of July, 1880, H. W. McNeel entered into a contract with the Northern Pacific Railroad Company for the purchase of the W. ½ of Sec. 33, and the N. W. ¼ of Sec. 27, Tp. 19, N., R. 45, E., W. M., for the sum of $1,920, $480 of which was paid on the execution of the contract. Some controversy thereafter arose between McNeel and the Railroad Company as to the description of the land which should have been embraced in this contract, McNeel claiming that the contract should have included the east half of said section thirty-three, instead of the west half thereof. By reason of this controversy, or for some other cause, no further payments were made on the contract, and on the 22d day of November, 1882 the Railroad Company declared a forfeiture and cancelled the same. Whether McNeel had notice of this forfeiture does not appear. Some of the witnesses refer to an assignment of this

contract by McNeel, but no evidence of such assignment appears in the record. McNeel continued in possession of the northwest quarter of section twenty seven, above described, and cultivated and improved the same, until it was turned over to a purchaser at execution sale, as hereinafter stated.

In 1895 the Railroad Company notified McNeel that he must purchase the last described quarter section, or the same would be sold to others, but nothing further was done. On the 7th day of March, 1896, the above quarter section, and 720 acres of other lands, to which McNeel held the legal title, were sold under execution, on a judgment against said McNeel in favor of one Edmison. Edmison became the purchaser at such sale, and on the 12th day of March, 1896, assigned all his rights as such purchaser to one W. L. McNeel, who immediately entered into possession of all the lands so purchased. On the 15th day of February, 1897, the said H. W. McNeel conveyed to the defendant N. L. Strange all the lands embraced in said execution sale, and on the 18th day of February, 1897, and as a part of the same transaction, the said McNeel and the defendants N. L. Strange, M. Doneen, E. J. Doneen, and D. T. Doneen entered into the following written agreement:

"This agreement, made and entered into this 18th day of February, 1897, by and between N. L. Strange, M. Doneen and D. T. Doneen, of Oakesdale, Wash., parties of the first part, and H. W. McNeel of Whitman County, Washington, party of the second part,

"Witnesseth: That, whereas, the said party of the second part has sold, transferred and conveyed unto the above named N. L. Strange by deed bearing date of the 15th day of February, 1897, all of the following described real estate, situate, lying and being in the county of Whitman and state of Washington, particularly described as follows: to wit: west half of section twenty-seven (27), east half of section thirty-three (33), south half of section thirty-four (34), and the west half of the northwest quarter of section thirty-four (34), all in township nineteen (19), North, Range 45, E., W. M.; and,

"Whereas, the said described lands are encumbered by various mortgages and judgments, and have been sold under a certain judgment in favor of one Matthew Edmison; and,

"Whereas, the said parties of the first part are about to undertake to redeem the said lands and with the issues, rent and profits thereof, pay out and clear the same from the encumbrances now against it, a part or the whole thereof;

"Now, therefore, it is hereby agreed that if said first parties secure the redemption of said lands from the sale under the judgment of said Matthew Edmison, and succeed in securing the crop from all or any portion thereof during the season of 1897, they bind themselves out of the proceeds of said crop to pay said second party one hundred dollars.

"That, if said first parties secure title to all or any portion of said lands, then they agree to pay the said second party an annuity of one hundred dollars per year, and in case they secure and hold all the said lands in addition to one hundred dollars per year, they promise and agree to furnish said second party a house on the place to live in, also feed for two horses, and sufficient land for a garden for his own use; and, further,

"That said first parties agree that if they secure the redemption of said lands from said judgment sale, they will apply the rents, issues and profits therefrom to the payment of the encumbrances, liens and judgments against the same and the interest thereon, and after the said lands have paid out, from the rents, issues and profits thereof, and the said first parties or either of them have received back any money they may have advanced to carry said lands, or to pay off any lien or encumbrance on the same, or any part thereof, together with interest on any sum or sums at the rate of ten per cent per annum until paid, and the said lands are fully paid out from the rents and profits of the same, then said first parties agree to make or cause to be made, executed and delivered to said second party, a good and sufficient deed on one quarter-section of said lands, and thereafter the obligation to pay said second party said one hundred dollars per annum or to furnish him a house, ground for garden or feed for horses, shall cease and such deed to said quarter-section of land shall fully terminate and fulfill from that time all obligations under this contract."

Soon after the execution of said last-mentioned agreement, the defendant Strange commenced proceedings in the superior court of Whitman county, against W. L. McNeel and others, to enforce the right of redemption from the execution sale, under which said McNeel and his tenants held possession of the property described in the above contract. On the 10th day of July, 1897, a judgment was entered in said proceeding, by consent, allowing a redemption by the said Strange, upon the payment of the sum of $3,000, each party to pay his own costs. About this time an action was commenced by the Northern Pacific Railway Company in the circuit court of the United States to recover from H. W. McNeel, and his tenant in possession, the northwest quarter of said section twenty-seven. The defendants claim that this was the first intimation they had that the title of said H. W. McNeel to said last described tract was defective. The defendants thereupon entered into negotiations with the railway company with a view of acquiring title to said quarter section. They presented to said company a certified copy of the deed from McNeel to Strange, and the Railway company entered into a ten year contract to convey said lands to the defendant E. J. Doneen for the sum of $1,280. It was agreed, at the same time and as a part of the same transaction, that the ejectment suit pending in the circuit court of the United States should be dismissed.

In the latter part of the year 1897, or early in the year 1898, Alfred Coolidge and W. J. Davidson, at the instance of the defendants, advanced the necessary funds to take up a mortgage in the sum of $9,000 with accrued interest, theretofore executed by H. W. McNeel to the Solicitors Loan & Trust Company, on a part of lands described in the above contract, and 80 acres additional which the said H. W. McNeel had theretofore conveyed to a third party. The mortgage was first assigned by the Solicitors Loan & Trust Company to S. J. Chadwick, attorney for the defendants, and thereafter by said Chadwick to the said Coolidge, as

collateral security for said loan. On the 8th day of February, 1898, Coolidge, at the instance and request of the defendants, commenced an action in the superior court of Whitman county to foreclose said mortgage against the said H. W. McNeel, the defendants in this action, and others.

There is a dispute between the parties as to the object of this foreclosure. One object apparently was to subject to the payment of the mortgage debt, the 80 acres of land which the mortgagor had conveyed to a third party after the execution of the mortgage and prior to the conveyance of the remaining lands to the defendant Strange. The plaintiffs claim that another object was to foreclose the rights of H. W. McNeel under the above contract. The defendants deny this, and claim that the object of the foreclosure was to cut off or shut out certain subsequent liens, and that the foreclosure was in the interest of McNeel, as well as in the interest of the defendants themselves. A judgment was duly entered in the foreclosure suit, and the mortgaged property was sold on execution to the plaintiff Coolidge. After Coolidge was paid in full for the advances made by him, he assigned the certificate of sale to Davidson to secure the advances made by the latter. Davidson obtained a sheriff's deed, and after all advances made by him were paid, he conveyed the property to the defendants in such portions as they had agreed upon between themselves. These deeds are now in the bank, held in escrow, to abide the result of this action.

H. W. McNeel died testate on the 23rd day of July, 1902, his will was duly admitted to probate, and the plaintiffs in this action are the executor of the will and the beneficiaries therein named. In the month of July, 1897, the defendants entered into the possession of all the lands described in the agreement above set forth, and have continued in possession ever since. They paid H. W. McNeel the annuity of $100 per year during his life time, and furnished him a house to live in, feed for two horses, and sufficient land for a garden, as required by the terms of their contract. The defendants

have also paid off all judgments, liens and encumbrances against said land, but whether they have been reimbursed for such payments out of the rents, issues and profits is a question we will consider hereafter. Ever since 1897 the defendants have claimed, and now claim, that they were relieved from any obligation to reconvey any portion of said lands to said McNeel, or to his successors in interest, by reason of the failure of McNeel's title to the northwest quarter of said section twenty-seven, as hereinbefore stated. This action was brought by the plaintiffs to enforce the rights of McNeel under said contract.

The pleadings are voluminous, and we will content ourselves by stating briefly the claims of the respective parties. The plaintiffs first contend that there was a mistake by the scrivener in the preparation of the contract between the parties in this: it was mutually agreed that the defendants should reconvey to the said McNeel the S. E. ¼ of Sec. 34, Tp. 19, N., R. 45, E., W. M., and all that portion of the S. W. ¼ of said section lying east of the county road and adjoining said S. E. ¼, but that through said mistake such provision was omitted from the written contract.

The next contention is that the defendants have at all times denied any rights in said McNeel under said contract; that they were guilty of fraud in the foreclosure of said Solicitors Loan & Trust Company mortgage, whereby they sought to foreclose the interest of said McNeel under said contract, and that they have failed to account to McNeel, or to his successors in interest, for the rents, issues, and profits of said land, or to keep any accounts whatever. By reason of these facts, it is contended that defendants have forfeited all rights under said contract, and should be compelled to reconvey the whole of said property to the plaintiffs.

The next contention is that said contract should at least be reformed so as to correct the mistake therein, and that as thus reformed, the defendants should be required to reconvey

to the plaintiffs the property which they agreed to reconvey. The defendants, on the other hand, contend that they are relieved from the obligation to reconvey any portion of said lands to the said McNeel or to his successors in interest, or to account for the rents, issues, and profits thereof, by reason of the failure of title to a portion of said lands as herein stated.

The court found against the plaintiffs on the question of mistake, and against the contention of the defendants that they were relieved from any obligation to reconvey a part of the lands, on account of the failure of title to another part. The court further found that there was still due the defendants, at the time of the trial, the sum of $4,135.21, on account of disbursements made by them under their said contract, over and above the rents, issues and profits received by them; and that, as soon as the defendants should receive such additional sum, with interest at the rate of ten per cent per annum, from such rents, issues, and profits, they should convey to the plaintiffs 160 acres of said land; and that, if the parties could not agree on the part to be conveyed, evidence should be taken to determine the reasonable value of all the lands included in said contract, and that plaintiffs should have judgment against the defendants for the reasonable value of 160 acres thereof, and that such judgment should constitute a lien on the whole of said lands until paid and satisfied. From this judgment, both parties have appealed.

Inasmuch as both parties are appellants, we will refer to them as designated in the court below. The finding of the court that there was no mistake or omission in the written contract between the parties is in accordance with the weight of the testimony. The evidence on this point is meager and unsatisfactory, resulting largely from the death of one of the parties and the legal disqualification of the others to testify. One witness testified, on the part of the plaintiffs, that the defendant Strange admitted to him, both before

and after the execution of the contract, that they were to reconvey to McNeel the lands now claimed by his heirs or devisees. The plaintiffs claim that this witness is corroborated by the fact that McNeel took up his residence on this particular tract, and resided there up to the time of his death. But the defendants were not required to furnish him a residence on any particular portion of the lands conveyed, and it would therefore seem that his residence on the tract which the plaintiffs now claim was as consistent with the contention of the defendants as with that of the plaintiffs. On the other hand, the defendant Strange denied that he made any such statements, and the attorney who prepared the contract for the parties testified that, while there was some conversation between McNeel and the defendants as to the particular tract that should be reconveyed, yet the defendants refused absolutely to agree to reconvey the tract now claimed by the plaintiffs, and that the agreement was executed in its present form advisedly and intentionally. The contention of the plaintiffs, therefore, in this regard cannot prevail.

The second contention of plaintiffs is equally without merit. It is stating the case too broadly to say that the defendants held all the lands conveyed to the defendant Strange in trust. The conveyance to Strange was absolute and unconditional, and McNeel retained no present or prospective interest in any of the property, except the quarter section to be reconveyed. The defendants undertook to pay a certain annuity, furnish a place to live, etc., which they have done. They undertook to pay off the indebtedness against the property, so as to relieve McNeel and the property that might be reconveyed to him from that burden, and this they have done. They undertook to reconvey 160 acres of the land to him, but this they have refused to do. The pleadings in the foreclosure suit give color, at least, to the claim that one of the objects of said suit was to foreclose McNeel's rights under the contract, but fraud will not be presumed, and said

suit may have been instituted from honest motives and without any intent to defraud. There is some foundation for the claim that the defendants were relieved from the duty to reconvey any part of the property, by reason of the failure of title to another part, and they forfeit none of their rights by asserting that claim. McNeel accepted his annuity and support from the defendants during his lifetime, and permitted them to remain in possession of the property and pay off the encumbrances against it, without complaint or protest of any kind, so far as the record discloses. If the defendants have not kept proper accounts, equity will protect the rights of the plaintiffs, without depriving the defendants of the fruits of seven or eight years of honest toil. This contention of the plaintiffs is wholly inconsistent with the conduct of him under whom they claim, and with the maxim that he who seeks equity must do equity.

Nor can we uphold the contention of the defendants that they are freed from the obligation to reconvey by reason of a defect in the title to one quarter section of the land. We are not called on to decide whether McNeel had, in fact or in law, any interest in this quarter section at the time of the conveyance. We are satisfied, from an examination of the record, that the claim of McNeel and the settlement of the pending lawsuit was an inducement to, and a part consideration for, the sale from the Railway Company to Doneen. The defendants acquired the property for not to exceed one-half its market value, and their relations to McNeel were such that a court of equity will not permit them to hold it against him or those claiming under him. The utmost that can be claimed in favor of defendants is that there was this additional indebtedness against the land which they had not bargained for.

The only remaining question is that of the accounting. The contract between the parties provided that the rents, issues and profits of the lands conveyed should be applied to the payment of the encumbrances, liens, and judgments

against the same. This language would not include taxes levied against the property subsequent to the conveyance. Through the conveyance to Strange, the defendants became the absolute owners of the property, except that portion agreed to be reconveyed, and the duty to pay taxes thereafter levied devolved upon them and cannot be imposed on the plaintiffs, unless the contract so provides. We are satisfied that the language of the contract only embraces encumbrances, liens, and judgments against the property at the time the contract was entered into, and the payment of taxes, subsequently levied, out of the rents, issues, and profits was unauthorized. The defendants were therefore improperly given credit for such taxes, amounting to about $1,700.

The defendants were also erroneously given credit for numerous items of expense, aggregating considerable sums in all, for permanent improvement on their own lands, such as digging a well, building houses, bridges, fences, etc. We are also of opinion that the principal object of the foreclosure of the Solicitors Loan & Trust Company mortgage was to enable the defendants to acquire, for their own benefit, the 80 acres of land subject to the mortgage, which McNeel had conveyed to a third party. Inasmuch as this foreclosure was largely, if not solely, for the benefit of the defendants, the plaintiffs should not be charged with any of the expenses thereof. In the accounting the plaintiffs were charged with certain items for insurance, but when a loss occurred, for which the defendants received $388, the plaintiffs were allowed no credit therefor. During the years 1903 and 1904, some of the defendants, at least, farmed the lands allotted to them under the partition agreed upon between them, and gave the plaintiffs credit for the value of one third of the crop. This method of accounting is wholly improper. The plaintiffs were entitled to credit for the value of the crops, less the actual expenses. The defendants could not be both landlord and tenant, and reap a profit both ways.

In addition to all this, the defendants kept no accounts

whatever as between themselves and McNeel, or the plaintiffs. They frankly admit that such is the fact. They simply deposited the proceeds of the sale of the crops in bank, checked out for expenses, and had periodical settlements as between themselves. They never kept a book or an account for the purpose of making a settlement with McNeel or his successors. The law clearly imposed upon them the burden of keeping true and accurate accounts, and they must suffer the legal consequences resulting from such failure. The account as rendered, consisting of numerous items, running over a period of several years, was made up during the progress of the trial in the court below. It was prepared from disconnected data and largely from memory. From such an accounting, the court was able to discover that the defendants in several instances claimed credit twice for the same disbursement, through the medium of checks, promissory notes and tax receipts. How many more such discrepancies remain undiscovered we do not know. The defendants failed absolutely to show, by proper accounts, that they have not been fully reimbursed, from the rents, issues, and profits, for all disbursements made in settlement and satisfaction of the encumbrances, liens, and judgments against the property, and the court should therefore have directed them to reconvey to the plaintiffs at once.

For this error, the judgment is reversed, and the cause is remanded to the court below, with directions to enter a decree adjudging the plaintiffs to be the owners of an undivided two-thirteenths interest in the following described lands, to wit: The West half of section twenty-seven, the East half of section thirty-three, the South half of section thirty-four, and West half of the Northwest quarter of section thirty-four, all in township nineteen, North, of range forty-five, East, W. M., and requiring the defendants N. L. Strange, E. J. Doneen, and M. Doneen to account to the plaintiffs for two-thirteenths of the net rents, issues, and

profits of all of said lands since the date of the judgment in the court below, April 24, 1905, and for costs in that court; and unless the parties agree upon the quarter section to be conveyed to the heirs of H. W. McNeel, deceased, the court shall proceed to partition said lands as between the plaintiffs and Strange and the Doneens, in the manner provided by law, awarding to the plaintiffs two-thirteenths thereof. The plaintiffs will recover their costs on this appeal.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR and ROOT, JJ., concur.

CROW, J., having been of counsel, took no part.

[No. 5764. Decided December 20, 1905.]

ED. E. WARNER, *Respondent*, v. SERENA E. MINER *et al.*, *Appellants*.[1]

TAXATION — FORECLOSURE OF LIEN — SUMMONS — SUBSCRIPTION. Under Bal. Code, § 4882, the original summons for publication in a tax foreclosure is sufficiently "subscribed" by the attorney for the plaintiff although the signature is printed.

SAME—NOTICE—SUMMONS BY PUBLICATION—NEWSPAPER PRINTED AND PUBLISHED IN COUNTY—PROOF—SUFFICIENCY. Under Bal. Code, § 4878, requiring the publication of a summons to be made in a newspaper printed and published in the county, service by publication is sufficient where the paper was printed at S. in said county and sent to and distributed at I. in said county, although the proof of publication is to the effect that it was printed and published at I.

SAME—NEWSPAPER—WHAT IS—EVIDENCE—SUFFICIENCY. A paper eleven by sixteen inches in size, containing four pages of four columns each, filled with general and local advertisements, legal notices, and general and local news, issued regularly each week, with a local circulation of 300 paid subscribers in a town of about 400 people, is a newspaper of general circulation in which the publication of summons is authorized.

SAME — RESIDENCE OF DEFENDANTS — DUTY OF PLAINTIFFS TO INQUIRE—STATUTE. An affidavit for the publication of a summons stating that two of the defendants are nonresidents and that their

[1] Reported in 82 Pac. 1033.

addresses are unknown, is sufficient to authorize the publication of a summons, although it was shown that the affiant knew that said defendants had acknowledged a deed before a notary of a certain county in another state, no duty devolving upon him to ascertain the addresses of the defendants by inquiry of such notary.

JUDGMENT — DEFAULT — INCORPORATION IN JUDGMENT. It is not necessary upon taking judgment by default to enter the default in a separate order.

SAME—DATE—CLERICAL ERROR. A clerical error of the county clerk in recording a judgment by filling up a blank for the date six days later than the filing date is immaterial, as the date of the judgment was the date of its filing.

TAXATION—FORECLOSURE—JUDGMENT—FORM—WHAT TO CONTAIN. Under Laws 1899, p. 99, § 18, prescribing the form for a judgment upon the foreclosure of a tax lien, and providing that the court shall order and direct the clerk to make out an order for the sale of the property, a judgment containing an order upon the treasurer to sell the tracts is a sufficient order of sale and a certified copy of the judgment signed by the judge and attested by the clerk is all that is required.

JUDGMENTS—VACATION OF DEFAULT—NEGLECT OF AGENT—SUFFICIENCY. Nonresident owners of property sold for taxes do not show sufficient ground for vacating the judgment by showing that their agent, a resident of the state, who held the fee and owned an equitable interest in the land, and who had paid the taxes up to a certain time, promised to pay the taxes but had failed to do so.

Appeal from an order of the superior court for Snohomish county, Yakey, J., entered March 30, 1905, in favor of the plaintiff, after a hearing on the merits, denying defendants' application to vacate a judgment foreclosing tax liens. Affirmed.

Brady & Gay, for appellants.

Brownell & Coleman, for respondent.

MOUNT, C. J.—This appeal is from an order denying an application to vacate the judgment in a tax foreclosure suit. The application was made in the original action by motion and petition combined. The record in the case shows that the taxes on certain real estate, for the years 1899, 1900, and 1901, became delinquent, and certificates of delinquency were

purchased by respondent, who, in June, 1903, commenced proceedings in the superior court of Snohomish county, where the land is located, to foreclose such certificates. The sheriff of said county made a return of the summons, to the effect that none of the defendants could be found in said county. One of the attorneys for the plaintiff in that proceeding thereupon made and filed an affidavit to the effect that all of the defendants were nonresidents of the state, and that the place of residence of each of the defendants was unknown to the affiant and the plaintiff. Thereupon service of summons was made by publication.

After the expiration of sixty days from the date of the first publication of the summons, and on August 13, 1903, a judgment of foreclosure was entered, which judgment directed the county treasurer of said county to sell the premises, or so much thereof as was necessary to satisfy the judgment. The county treasurer advertised the property for sale, and subsequently, on August 29, 1903, sold the same, and respondent became the purchaser at such sale. On June 10, 1904, appellants filed their application to vacate the judgment. After a hearing upon the merits, the application was denied. The facts alleged in the petition and shown on the hearing will be stated in connection with the points upon which appellants rely for a reversal.

(1) Appellants first contend that the court acquired no jurisdiction to enter the judgment, because the service was acquired by publication, and the original summons which was published contained the printed names of the attorneys, while the statute requires the summons to be *"subscribed"* by the plaintiff or his attorneys. Appellants insist that the printed signature is insufficient. No authority is cited to sustain this contention. Our statute provides that proof of service shall be by affidavit of the publisher showing the same, "together with a printed copy of the summons as published" (Bal. Code, § 4882), which indicates that the published summons may contain the subscriber's name printed; and it has

been held that, where the statute requires the summons to be subscribed by the plaintiff or his attorney, it is not essential that the signature shall be written in the hand of the plaintiff or his attorney. A printed or stamped signature is sufficient when it is adopted as the signature of either. *Mezchen v. More,* 54 Wis. 214, 11 N. W. 534; *Herrick v. Morrill,* 37 Minn. 250, 33 N. W. 849; 7 Words & Phrases, p. 6729. This is, without doubt, the correct rule.

(2) The statute requires that the publication of a summons shall be made in a newspaper printed and published in the county where the action is brought Bal. Code, § 4878. The affidavit of publication stated that the summons was published in the "Index Miner," a newspaper of general circulation "printed and published at Index, in Snohomish county, Wash." At the trial the publisher testified that the newspaper was printed at Snohomish, and sent to the town of Index where it was distributed through the mails to its subscribers. Appellants contend that the affidavit of the publisher was therefore false, and that the jurisdiction of the court, depending upon the truthfulness of the affidavit, must therefore fail. While the newspaper was not printed at Index, it was, under this showing, published at that place. The fact that it was not printed at Index is wholly immaterial, because the statute requires only that the newspaper shall be printed and published in the county. Both Snohomish and Index are within Snohomish county, and the affidavit therefore complied with the statute, even though the affidavit stated it was printed at Index, when as a fact it was printed at Snohomish in said county. The misstatement of an immaterial fact is not fatal.

(3) Appellants contend that the paper in which the summons was published is not a newspaper within the meaning of the statute. A copy of the paper is attached to the record as an exhibit. It is eleven by sixteen inches in size and contains four pages, four columns to the page, and is filled with general and local advertisements, legal notices, and gen-

eral and local news items, and has all the appearances of a small newspaper. The publisher testified that at the time of the trial the newspaper had a local circulation of about three hundred paid subscribers in the town of Index, which contained a population of about four hundred people, and that the paper had an outside circulation throughout the state of about one hundred copies, and that when the summons in question was published the paper had a circulation somewhat greater than at the time of the trial; that it was issued regularly each week, and had been so issued for several years. Under the rule announced in *Puget Sound Pub. Co. v. Times Print. Co.*, 33 Wash. 551, 74 Pac. 802, this was a newspaper of general circulation in which summons was authorized to be published.

(4) It is conceded that no copies of the complaint or summons were mailed to the defendants, and respondent testified that he knew there was a deed on record in Snohomish county which was acknowledged before a notary public in Siskiyou county, California, by two of the defendants, and by the other defendant before a notary public in Hennepin county, Minnesota. An affidavit was filed in which it was stated that neither the respondent nor his attorneys knew the place of residence of the appellants, nor any of them. It is not contended that this affidavit was false, but it is claimed that the information above stated in relation to the deed which was of record in Snohomish county made it the duty of respondent to inquire, and that a reasonable inquiry would have revealed the residence of defendants.

The statute does not impose the duty on a plaintiff to inquire as to the residence of nonresident defendants. It simply requires him to state the fact that such residence is not known to the affiant. Bal. Code, § 4877. But conceding, without deciding, that the plaintiff must use reasonable diligence to find the residence of a defendant, we think there is nothing here which, by the use of such diligence, would have disclosed the residence of the defendants. It is not shown when

the deed was acknowledged. It is not claimed that the post-office addresses of the notaries or of the defendants were given in the deed on record. It is claimed that the notaries at the times the acknowledgements were taken were within certain counties. It is also claimed that the respondent, by writing letters to the county officers of such counties, could have located the notaries, and then the notaries could have located the defendants, and that the information could thus have been acquired. It is probable that the residences of the defendants might have been discovered in that way, but it does not follow that the county officers would have known the addresses of the notaries, or that the notaries would have known the addresses of the defendants at the time the suit was brought, because all may have changed their residences from the places where they resided when the deed was acknowledged. At any rate, it would have required more than ordinary diligence to have found the addresses of defendants in this roundabout way; and since no duty was imposed by statute upon the plaintiff to inquire, he was not bound to make such extraordinary inquiry.

(5) No formal entry of default was entered before the judgment was taken, and appellants claim this as an irregularity. The appellants were in default as a matter of fact. The judgment recites: "This cause having this 19th day of August, 1903, been brought on to be heard upon the application for judgment foreclosing tax liens herein, on default of each of the above named defendants, which said default is hereby granted and allowed by the court." It was not necessary for the court to enter a default against the defendants in a separate order. It is common and correct practice to enter the default in the final judgment.

(6) The judgment recites, "This cause having this 19th day of August, 1903, been brought on to be heard." Then follows the findings and judgment, and finally the signature of the trial judge. This final order bears the clerk's filing mark, "Filed August 13, 1903. G. W. Adamson, County

Clerk." Appellants contend that this irregularity is sufficient upon which to vacate the judgment. The clerk when called as a witness testified that the judgment was filed on August 13, 1903, with the date at the beginning of the judgment left blank; that the judgment was entered on the journal in his office a few days later, when he mistook the figure 3 for a 9, and by such mistake filled in the blank at the beginning of the judgment with the figures 19, and thus made the judgment appear to have been filed six days before it was signed by the judge. This was clearly a clerical error which amounted to no irregularity. It could not have been filed before it was signed. The date of a judgment is the date of its filing. *Quareles v. Seattle,* 26 Wash. 226, 66 Pac. 389.

(7) Appellants next contend that the form of the judgment is not in accordance with the requirements of the statute. The judgment order, after finding certain facts, recites:

"That plaintiff herein be given judgment against the property hereinbefore mentioned for the aforesaid amount of plaintiff's lien with costs amounting to $25.80, which said judgment shall be a several judgment against each tract or lot or part of a tract or lot of land hereinbefore mentioned in the amounts set opposite thereto, as follows."

Then follows a description of each tract of land, with the amount of taxes delinquent and amount paid for the years after delinquency, and accrued interest and costs, and the total amounts of the judgment against each tract. Then follows an order upon the treasurer to sell the said tracts, according to law, to satisfy the judgment, with interest and accruing costs. The judgment and order is signed by the judge and attested by the clerk. No form of judgment order in tax foreclosure proceedings is provided by statute. But the law provides:

"The court shall give judgment for such taxes, assessments, penalties, interest and cost as shall appear to be due upon the several lots or tracts described in said notice of application for judgment or complaint, and such judgment shall

be a several judgment against each tract or lot or part of a tract or lot for each kind of tax or assessment included therein, including all penalties, interest and costs, and the court shall order and direct the clerk to make out and enter an order for the sale of such real property against which judgment is made, or vacate and set aside the certificate of delinquency or make such other order or judgment as in law and equity may be just. Said order shall be signed by the judge of the superior court and attested by the clerk thereof and a certified copy of said order, together with a list of the property therein ordered sold shall be delivered to the county treasurer, and shall be full and sufficient authority for him to proceed to sell said property or so much of each tract or lot as may be necessary for said sum as set forth in said order and to take such further steps in the matter as are provided by law." Laws 1899, pp. 299-300, § 18.

Appellants argue that the provision that, "the court shall order and direct the clerk to make out and enter an order for the sale of such real property against which judgment is made," is required to be a part of the judgment, and that the court, by reason of its limited jurisdiction, has no power to enter a judgment which does not contain a direction to the clerk to make out and enter an order of sale. There is no merit in the contention that the judgment order itself shall contain a direction to the clerk to make out and enter an order of sale, because the statute does not require it. It says the court shall order and direct the clerk to do so. This order and direction, no doubt, may be made in a separate order, or it may be made orally, or may be acted upon by the clerk without special direction. The judgment itself is such an order. When the order of sale is issued or made out, it shall be signed by the judge and attested by the clerk, and a certified copy delivered to the county treasurer. The statute does not provide a form for the order of sale. We have no doubt that a certified copy of the judgment, signed by the judge and attested by the clerk, which judgment orders the property to be sold, is an order of sale in strict compli-

ance with the provision of the statute above quoted. There is, therefore, no irregularity in the form of the judgment.

(8) Appellants next contend that the judgment should be vacated within the year upon the ground of excusable neglect. The record shows that the appellants are now, and have been at all times, non-residents of this state; that they acquired the land in question in 1890 or 1891; that they owned the fee, and one B. Mullen, a resident of this state, owned an equitable interest in the land; that Mr. Mullen paid the taxes up to 1896 or 1897, and then promised appellants that he would continue to pay the taxes in the future, having money of appellants for that purpose. Appellants gave no more attention to the land until 1903, when J. U. Miner, one of the appellants, requested a friend to find a purchaser for the land. This friend, in September, 1903, reported that the land had been sold for taxes to respondent. Appellants thereupon began negotiations for a settlement with respondent, but no agreement was reached. Thereupon these proceedings were commenced. Conceding that the vacation of default tax judgments falls within the provisions of Bal. Code, § 4880, that section cannot apply to this case, for the reason that sufficient cause has not been shown. The only cause shown is that appellants and their agents have neglected for a period of five years to pay their taxes. Under the circumstances above stated, the appellants were probably justified in relying upon their agent; but there is no excuse offered for the agent. The default of the agent is necessarily the default of the principal. This case is not distinguishable upon this point from *Williams v. Pittock,* 35 Wash. 271, 77 Pac. 385; *Whitney v. Knowlton,* 33 Wash. 319, 74 Pac. 469; or *Swanson v. Hoyle,* 32 Wash. 169, 72 Pac. 1011.

We find no error in the record. The judgment is therefore affirmed.

DUNBAR, CROW, HADLEY, RUDKIN, and FULLERTON, JJ., concur.

[No. 5722. Decided December 21, 1905.]

ROBERT NISBET, *Plaintiff*, v. GREAT NORTHERN CLAY COMPANY, *Defendant*, A. L. BROWN, *as Receiver etc., et al., Respondents*, OHIO CERAMIC ENGINEERING COMPANY, *Appellant*.[1]

RECEIVERS — SALES — CONFIRMATION. The confirmation of a receiver's sale, consented to by all the creditors excepting one, should not be set aside at the instance of a single creditor, where it is not shown that any higher sum could be realized upon a resale, and the highest sum possible seems to have been obtained.

SAME—RECEIVER'S CERTIFICATES—PRIORITY. A creditor is in no position to contest the priority of receiver's certificates which recited that they were a first lien on the assets, where his rights were based upon a similar receiver's certificate reciting that the others were prior liens; nor could he contest the priority of another earlier certificate which by inadvertence was not mentioned in his certificate.

SAME—CLAIMS FOR LABOR—PRIORITY. A receiver's certificate is junior to the claims of laborers for services performed for the receiver, under Laws 1897, ch. 43; especially where it states on its face that it is subject to the expenses of the trust.

RECEIVERS — SALES — CERTIFICATES AS PART OF PURCHASE PRICE. A receiver's sale cannot be attacked on the ground that the purchaser had an understanding with the court that certain receiver's certificates should be received as part of the purchase price where such certificates were entitled to priority and must first be paid out of the proceeds of the sale.

RECEIVERS—SALES—NOTICE. It is not necessary to give creditors notice of a receiver's sale, where the sale is made in good faith and is for the best interests of the trust.

RECEIVER—ALLOWANCE FOR FEES. An allowance of $2,000 for a receiver and his attorney out of an insolvent estate from which $11,200 was realized held not excessive on the showing made.

Appeal from an order of the superior court for King county, Bell, J., entered January 7, 1905, after a hearing on the merits, denying a petition to vacate a receiver's sale and order of confirmation. Affirmed.

[1]Reported in 83 Pac. 15.

Allen, Allen & Stratton, for appellant.

Kerr & McCord, James Kiefer, and *M'Cafferty & Kane,* for respondents.

HADLEY, J.—This appeal is from an order denying a petition to vacate an order confirming a receiver's sale. The original action was brought by Robert Nisbet against the Great Northern Clay Company, a corporation. Insolvency of the corporation was alleged and admitted, and a receiver was appointed. The receiver, by authority of the court, conducted the business of the corporation for some months, with unprofitable results. The first receiver appointed conducted the business for a few weeks, when he was succeeded by J. E. Ballou, who managed the receivership and affairs of the corporation for some months, when he left the state leaving liabilities of the receivership aggregating a large sum. Ballou was then removed as receiver and A. L. Brown was appointed as his successor. The disastrous results appear to have been due to the management of receiver Ballou.

During such management, the property deteriorated in value and was in a dilapidated condition when Ballou left it. The expenditure of some thousands of dollars was necessary by way of repairing and improving the brick plant before it could be successfully operated. The receiver was unable to do this inasmuch as the trust was insolvent. The business could no longer be conducted through the receivership. The property was constantly depreciating in value, and with this condition of affairs confronting him the present receiver Brown entered upon his duties. It was the desire of the court and the receiver to prevent further depreciation in value of the assets and thenceforth the efforts of both were directed to the end that the assets of the trust might be converted into cash for the benefit of creditors as speedily and advantageously as possible.

For a better understanding of the questions involved on this appeal, a further definite and somewhat extended state-

ment as to certain facts becomes necessary. On October 1, 1903, a receiver's certificate was issued by receiver Ballou to the First National Bank of Seattle, for $3,000, bearing interest at eight per cent per annum, and on the 2d day of November of the same year, another certificate was issued by the same receiver to the same bank for $2,000, bearing the same rate of interest. Upon the face of the first certificate, it was declared to be a first lien upon all the assets and property of the corporation. The second one was declared to be a lien upon all the assets prior to all other liens and claims except that of the said $3,000 certificate. The said certificates were issued by the authority of the court, and were approved by it. The amount of money represented by the two certificates was loaned by said bank to the receiver.

On the 10th day of November, after the issuance of the last certificate above mentioned, another certificate was likewise issued by the receiver to the Ohio Ceramic Engineering company of Cleveland, Ohio, for $1,500, bearing interest at six per cent per annum. This certificate stated upon its face that it was a prior lien upon all the assets of the corporation, except the $3,000 certificate above mentioned and the costs and expenses of the trust. The certificate was issued in payment for one hundred dryer cars, purchased by receiver Ballou from said payee named in the certificate. Receiver Ballou also employed certain laborers while operating the plant, and promised to pay them sums aggregating $2,077.70. The claims of these laborers were assigned to said First National Bank of Seattle. The total amount thus held by said bank against the trust including the two certificates mentioned and the assigned labor claims, was, with interest, $7,248.86, on the day of the confirmation of the sale which it is here sought to set aside.

On the 9th day of February, 1904, Robert Nisbet, the plaintiff in the action wherein the receiver was appointed, filed his petition with the court, asking an order for the sale of all the property of the Great Northern Clay Com-

pany, then in the hands of the receiver. Such an order was made authorizing the receiver to sell the property at public auction to the highest bidder for a minimum price of $20,000, and requiring not less than ten days' notice of the sale. Notice as prescribed in the order of sale was given, and the time fixed for the sale was March 5, 1904, at which time the receiver offered the property for sale but received no bids, and thereupon he continued the sale until March 10. Immediately after the said adjournment of sale, the receiver and his attorneys, together with the attorneys of substantially all the parties who had appeared in the action, went before the superior court then in session, and in open court reported the failure to sell. Discussion was had between court and counsel with reference to the emergency for immediate sale. The court thereupon instructed the receiver to re-offer the property for sale as before for the sum of $20,000, and if that sum could not be obtained, to offer the property regardless of price, subject to the confirmation and approval of the court. Thereupon Ernest Carstens offered in open court to bid for the property provided the aforesaid claims of the First National Bank of Seattle should be received as a part of the purchase price. This was made in the presence of the court and counsel at the time they were together as aforesaid. The court thereupon stated in the hearing of all present that, if said Carstens would bid at the adjourned sale a sum which should be accepted and approved by the court, the amount of the claims of said bank would be accepted as a part of the purchase price, if said Carstens could acquire the claims. It was in this manner and through this understanding with the court and counsel for interested parties that Mr. Carstens became involved in the matters which led to the controversy brought here by this appeal.

Accordingly, on March 10, the property was again offered for sale by the receiver, and Mr. Carstens bid therefor the sum of $11,200, conditioned upon the use of the obligations of the receiver to the First National Bank of Seattle as a

part of the purchase price. The receiver reported the offer to the court and notice of hearing thereon was given to all parties to the action and to all creditors who had filed appearances in the action. At the hearing the advisability of accepting the offer was fully discussed and considered in the presence of counsel, who represented substantially all of the interested parties, and the court, believing that the offer was the best that could be obtained, directed the receiver to accept it. Thereupon Mr. Carstens paid the receiver $11,200, of which sum $7,248.86 consisted of receiver's certificates and assigned labor claims held by the bank as aforesaid, and the balance, $3,951.14, was paid in cash. The sale was confirmed by the court and by its order a conveyance was executed by the receiver, transferring all the property to Mr. Carstens.

Therafter the Ohio Ceramic Engineering Company filed a petition asking that the sale, the order approving it, and the conveyance be set aside. The petition recites the facts heretofore stated with reference to the issuance of the $1,500 receiver's certificate to the petitioner, and alleges that the petitioner had no notice of the sale or of any of the proceedings had in connection therewith. It is also alleged that, as a consequence of said proceedings, all the purchase price of the property was appropriated by the receiver to the payment of claims other than that of the petitioner, and which were in fact subordinate and inferior in right and equity to the claim of the petitioner. It is also alleged that allowances were made to the receiver in the sum of $1,200 for his own services, and $800 for his attorney's services, which sums are charged to have been excessive; and it is asked that the order of allowance be set aside. The petition was denied and from the order of denial the petitioner is prosecuting this appeal.

From the record we are satisfied that all parties thereto were advised of the proceedings concerning the sale of the property, and assented to the confirmation thereof, except

the appellant. At least, no one except appellant has raised any objection to the proceedings. We are furthermore satisfied that the highest possible sum was obtained for the property. Appellant has in no manner pointed out how a greater sum might have been realized, if it had been present and had actually participated in the proceedings. Without discussing the question of its right to notice of the proceedings, and assuming that appellant is in position to contest the regularity thereof, it is nevertheless true that, with its opportunity at the hearing of its petition, it has not shown that the trust had been in any sense the loser by the sale and its confirmation. We therefore think the court was fully justified in entering the judgment which was rendered upon the hearing of appellant's petition, which in terms reaffirms and reapproves the sale. This was an order entered after a full hearing from appellant, and it seems to us that appellant is now concluded thereby so far as any question of notice is concerned. It has had its day in court and an opportunity to be heard upon the questions it is urging, and unless some substantial right has been violated, the order of confirmation should stand.

The next question to be considered is that of the consideration for the sale which was accepted by the receiver and approved by the court. Appellant is not in position to contest the validity of the receiver's certificates as constituting prior liens upon the property of the trust, for the reason that the relief it now seeks is based upon such a certificate. Its certificate states upon its face that it is junior to one for $3,000 held by the bank aforesaid, and also that it is junior to the expenses of the trust. The fact was, however, that eight days before its certificate was issued, another one for $2,000 was issued to the bank, which fact was doubtless overlooked by inadvertence when appellant's certificate was drawn, and was not mentioned therein. The $2,000 certificate was, however, first in point of time, was for an actual cash loan, was declared to be a prior lien by order of the court, and appellant's

certificate must therefore be held to be subject and junior to it.

Its certificate was also junior to the laborers' claims, for two reasons: The laborers were entitled to a prior lien upon the property of the corporation under chapter 43, session laws of 1897, and the certificate itself says it is subject to the expenses of the trust. The labor was performed in behalf of the trust at the instance of the receiver, and by authority of the court. It follows that all the claims allowed by the court as part of the purchase price of the assets were liens upon the assets and prior to the appellant's claim. Being prior liens upon the assets, the holder of the claims would, so far as appellant was concerned, have been entitled to the first money from the proceeds of the sale if the sale had been entirely for cash. By the application of the amount of the claims to the purchase price, the result was the same as though the full price had been directly paid in cash. We think respondent Carstens as the holder of those claims would have been entitled to turn them in as part of the purchase price even in the absence of the previous understanding had with the court. In *Mercantile Trust Co. v. Kanawha etc. R. Co.*, 58 Fed. 6, the purchasers were permitted to deposit bonds in payment of the purchase price, after paying into court sufficient cash to extinguish the costs and liens prior to the bonds. Of this the court said:

"This was precisely the same as if the purchasers had paid the whole price in money, and had then withdrawn, on distribution, their *pro rata* share of the proceeds. Their rights cannot be different because they did not go through this useless formality. The railroad property, to the extent that it was paid for by bonds, was, in the hands of the purchasing bondholders, proceeds of sale."

We therefore think the sale, its approval, and all the proceedings considered together, including the order of re-confirmation aforesaid, were of sufficient regularity, and that appellant's rights were not prejudiced thereby. We know of

no statutory requirements regulating the sale of property by receivers in this state which make it necessary to give notice to all the creditors. The sale is made under the direction of the court as a court of equity, and it should be presumed that the court and its officer will make an honest effort to realize the greatest sum possible for the assets of the trust. When, therefore, a purchaser has bought in good faith, unless it is subsequently made to appear that the best interests of the trust would be served by not making any sale at all, or that the consideration is inadequate, his rights become established and should not be disturbed. Particularly should it be so when it appears that no higher sum could have been realized. Under such circumstances we are unable to see that a creditor's rights are prejudiced by the mere fact that he did not have actual notice of the sale. The record of this case shows that, if appellant had been present at the sale proceedings and at the time of the first confirmation, it would have been unable to effect a different result from that which was obtained. Its claim would necessarily have been postponed as junior to those applied upon the purchase price, for the reason that the law under the facts fixed its status so. Being subject to those claims, appellant's claim therefore becomes a first lien upon the remaining assets except expenses of the trust, for the reason that it is expressly made subject to such expenses.

Appellant's interest in the premises therefore seems to be confined to the right to share in the distribution of the balance with preference according to the terms of its certificate. The purchaser paid to the receiver $3,951.14 cash, which exceeds the amount required to pay appellant's claim by considerably more than $2,000. Unless more than the excess is required to pay necessary expenses of the trust, appellant is still amply protected. The petition shows that, by an order of the court, the receiver and his attorneys were allowed for services the aggregate sum of $2,000. It is claimed that this was excessive and the petition asks that

the order of allowance be set aside. After hearing testimony upon this subject, the court reaffirmed its former decision as to the value of the services. From all that is shown in this record we shall not undertake to say that the finding was erroneous. Other allowances said to have been made at different times during the administration of the trust are discussed in appellant's brief, but they are not mentioned in its petition, are not within the issues before us, and are not covered by the judgment from which the appeal is taken. They therefore involve questions that are not before us.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5818. Decided December 21, 1905.]

ANNIE GUYATT, *Respondent*, v. NUGENT KAUTZ *et al.*, *Appellants*.[1]

INDIANS—LANDS—RULES OF DESCENT—PATENT. Lands allotted in severalty to an Indian as the head of a family by a patent subject to forfeiture if the lands were abandoned, and restricting the right of alienation for a certain period and until removed by legislative act, descends, upon the death of the allottee without children, as a qualified or base fee (which may become absolute upon removal of the restrictions) to his wife as the only remaining member of the family, under the community property laws of the state, where the customs and rules of descent of the tribe are not shown, such laws not being in conflict with the terms of the patent.

SAME—DESCENT AND DISTRIBUTION. By the Act of Congress of February 8, 1887, making the Puyallup Indians citizens of the United States, the laws of descent in force in the state of Washington became applicable to the Puyallup Indian lands allotted in severalty; and lands inherited by the wife of an original allottee descend upon her death to her daughter as her only heir, in preference to descendents of the sisters of the original allottee.

SAME—PATENT—TITLE. Under the Act of Congress removing the restrictions upon alienation of the lands of the Puyallup Indians, the qualified fee of the Indians ripened into an absolute fee simple title.

[1]Reported in 83 Pac. 9.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered May 9, 1905, in favor of the plaintiff, upon overruling a demurrer to the complaint, and the refusal of the defendants to plead over, in an action to quiet title. Affirmed.

F. Campbell, for appellants.

George T. Reid, for respondent.

Crow, J.—Respondent, Annie Guyatt, brought this action against Nugent Kautz and August Kautz, appellants, to quiet title to one hundred and sixty acres of Puyallup Indian land, in Pierce county. The allegations of the complaint are as follows:

"(1) That on the 26th day of December, 1854, a treaty was concluded between the Puyallup and other bands of Indians on the one part, and the United States on the other part, and was thereafter duly ratified and confirmed by the president and senate of the United States. (2) That, by the terms of said treaty, lands were reserved for the members of said bands of Indians, and it was agreed that the same were to be assigned and patented to said members in severalty; that the lands hereinafter described were a portion of the lands so reserved by said treaty. (3) That on and prior to the 30th day of January, 1886, Napoleon Gordon was a Puyallup Indian and was one of the members of the Puyallup tribe of Indians, and was one of the members of said tribe entitled to an assignment of land on said reservation under the provisions of said treaty. That on and prior to said 30th day of January, 1886, said Napoleon Gordon and one Sarah, a Puyallup Indian woman, were husband and wife, and they had, prior to said date, made a location on the land hereinafter described, as a permanent home. (4) That on the 30th day of January, 1886, under the provisions of said treaty, the United States executed and delivered to the said Napoleon Gordon a patent for said land, which said patent is in the words and figures following, to wit:

" 'The United States of America, To all to whom these presents shall come, Greeting: Whereas, by the sixth article of the treaty concluded on the twenty-sixth day of December,

Anno Domini one thousand eight hundred and fifty-four, between Isaac I. Stevens, governor and superintendent of Indian Affairs of Washington Territory, on the part of the United States, and the chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squaksin, S'Homamish, Stechchass, T'Peeksin, Squiatil and Sa-heh-wamish tribes and bands of Indians, it is provided that the President, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable; And, Whereas, there has been deposited in the General Land Office of the United States an order bearing date January 20th, 1886, from the secretary of the interior, accompanied by a return, dated October 30th, 1884, from the office of Indian Affairs, with a list approved October 23rd, 1884, by the President of the United States, showing the names of members of the Puyallup band of Indians who have made selections of the land in accordance with the provisions of the said treaties in which lists the following tracts of land have been designated as the selection of Napoleon Gordon, the head of a family consisting of himself and Sarah, viz: [Here follows a description of the land.]

"'Now, know ye, that the United States of America, in consideration of the premises and in accordance with the directions of the President of the United States under the aforesaid sixth article of the treaty of the sixteenth day of March, *Anno Domini,* one thousand eight hundred and fifty-four, with the Omaha Indians, has given and granted, and by these presents does give and grant, unto the said Napoleon Gordon, as the head of a family as aforesaid, and to his heirs, the tracts of land above described, but with the stipulation contained in the said sixth article of the treaty with the Omaha Indians, that the said tracts shall not be aliened or leased for a longer term than two years, and shall be exempt from levy, sale or forfeiture, which conditions shall continue in force until a state constitution embracing such lands within its boundaries shall have been framed and the legislature

of the state shall remove the restrictions, and no state legislature shall remove the restrictions without the consent of Congress. To have and to hold the said tracts of land, with the appurtenances, unto the said Napoleon Gordon, as the head of a family as aforesaid, and to his heirs forever, with the stipulation aforesaid. . . .'

"(5) That the Sarah named in said patent was the wife of said Napoleon Gordon, and the said Napoleon and the said Sarah were the only members of said family. (6) That in the month of October, 1886, said Napoleon Gordon died intestate in Pierce county, Washington, leaving him surviving his wife Sarah, but leaving no issue nor father nor mother, but leaving a sister, one Kitty Kautz. (7) That said Kitty Kautz was not a member of said Napoleon Gordon's family, and she received a patent for an assignment of land upon said reservation at the same time said Gordon received his patent. (8) That thereafter said Kitty Kautz died intestate, leaving as her sole heirs the defendants, Nugent Kautz and August Kautz, her sons. (9) That thereafter, and in the year 1897, the said Sarah died, intestate, leaving as her sole heir her daughter, Annie Guyatt, this plaintiff. (10) That after the death of said Napoleon Gordon the said Sarah remained in possession of the land in said patent described until her death, that upon the death of said Sarah this plaintiff took possession of said land and ever since has been and now is in possession thereof. (11) That heretofore the legislature of the state of Washington, by and with the consent of the Congress of the United States, removed the restrictions contained in said treaty against the alienation of said lands by the Indians, which said removal became operative on the 3rd day of March, 1903. (12) That by an act of Congress passed and approved on the 8th day of February, 1887, said Sarah Gordon, Kitty Kautz, Nugent Kautz, August Kautz and this plaintiff became citizens of the United States, and upon said date and by virtue of said act of Congress the tribal relations of the members of the Puyallup tribe of Indians ceased and terminated. (13) That by reason of the facts aforesaid the defendants and each of them claim a right and interest in and to said premises adverse to plaintiff, which claim operates as and is a cloud upon plaintiff's title to said premises."

A copy of the sixth article of the Omaha treaty appears in the opinion of this court in *Bird v. Winyer,* 24 Wash. 269, (64 Pac. 178), at page 274. Appellants interposed a general demurrer to said complaint, which being overruled, they declined to plead further. Judgment was thereupon entered, quieting respondent's title, and this appeal has been taken.

The only assignment of error is that the court erred in overruling said demurrer and entering judgment in favor of respondent declaring her the owner of the lands, and that appellants had no interest therein. Appellants contend that no title other than a mere right of possession passed to Napoleon Gordon under said patent, citing *Bird v. Winyer, supra,* and *Jackson v. Thompson,* 38 Wash. 282, 80 Pac. 454. Assuming that no right other than a mere possession was granted by said patent, and commenting on said restriction on alienation, appellants, in their opening brief, say:

"The facts in this case are squarely covered by both of those cases. The restrictions upon these lands were not removed and the fee did not vest until after March 3, 1903. Sarah Gordon died in 1897. Six years before that time, and while there was nothing but a possessory right in the land, her daughter Annie, the plaintiff herein, was not a member of the family, but was her child by a former marriage, hence no rights would pass by inheritance to such child.

"It would make no difference in this case whether the court laid down the rule that Sarah by virtue of the patent took an equal interest with Napoleon Gordon at the date of the patent or not. What she did take was simply a possessory right, and that is all she held at the time of her death in 1897. She could not inherit from Napoleon Gordon, because there was nothing to inherit but a possessory right, which ceased at her death in 1897.

"The patent runs to Napoleon Gordon and his heirs; therefore, when the fee under the patent attached in 1903 it vested in his heirs alone. His sole surviving heirs on March 3, 1903. and now, are the two defendants in this case, Nugent and August Kautz; they are his blood relatives, namely, the children of his deceased sister, Kitty Kautz. He left no

wife or children surviving him at the time his grant ripened into a fee title, on March 3rd, 1903; neither did he leave a father or mother. These two defendants, his now deceased sister Kitty's children, are the sole blood relatives of Napoleon Gordon, and are the sole and only owners of this land. Either this must be so, or the title could not vest in anybody, and would go to the state or county by escheat. The defendants must take this land by inheritance, or the decisions hereinbefore referred to and rendered by this court must be reversed."

We make this quotation to show appellants' theory, which we think it unnecessary to analyze. It is true that certain language used in *Bird v. Winyer, supra,* and quoted in *Jackson v. Thompson, supra,* would seem to support appellants' contention that possession was the only right conveyed by the patent. But we do not think the question as to whether the right conveyed by the patent was possession only or amounted to a fee was necessarily involved in either of those cases. The final judgment in each instance was correct, whatever the character of the title. All expressions used in *Bird v. Winyer* on this subject were uttered *arguendo* in arriving at the final judgment of this court. Yet, we there find use made of the following expression as descriptive of the title of Bird, under his patent: "There was simply a defeasible title conveyed, and that is the condition of the estate at the present time." At said time the restrictions on alienation had not been removed. Bird afterwards instituted an action in the United States circuit court against one Frank Terry, to enjoin him from interfering with his possession and to secure to himself the fruits of his former litigation. In that action, although Hanford, J., speaking for the Federal court, approved the decision of this court in *Bird v. Winyer,* he in substance held Bird's patent did convey title. See, *Bird v. Terry,* 129 Fed. 472.

Again, in *Ross v. Eells,* 56 Fed. 855, Hanford, J., in defining the character of title conveyed by a similar patent said:

"First, the patents issued by the President pursuant to the treaty made with the Indians passed the title in fee from the United States to the patentees, subject only to the restrictions and conditions subsequent, expressly declared in said treaty. No estate or reversionary interest in the patented lands is reserved or now held by the United States. The restrictions prevent alienation of the lands until authorized by a law of the state to which Congress must consent, otherwise than by leases for terms not exceeding two years. The conditions subsequent are that, for specified causes, any patent may be by the President canceled, and the land so forfeited may be assigned to other Indians, or sold for the benefit of all the Indians of the tribe in common. Instead of reserving the right to terminate the estate by a re-entry for breach of the condition, as is usual in conveying an estate subject to a condition, each of these patents creates a power in the president to reassign the land or sell it. This power is not inconsistent with the complete investure of title in the patentees."

Although *Ross v. Eells* was afterwards reversed in *Eells v. Ross,* 64 Fed. 417, yet in the latter case no exception was taken to said doctrine, which Hanford, J., again announced in *United States v. Kopp,* 110 Fed. 160. After a careful consideration of the terms of said patent, the sixth article of the Omaha treaty, the beneficial results sought to be attained thereby, and in the light of the authorities, we conclude that the patent set forth in the complaint conveyed to Napoleon Gordon a base, or qualified, fee simple title, subject to temporary restrictions as to alienation, which might thereafter become an absolute fee simple title. The qualifications subjoined to said base fee resulted from the stipulation of said sixth article of the Omaha treaty, that if said patentee or his family should neglect to till the soil or should rove from place to place, the president might cancel said assignment, even though patent had issued. This was a condition, however, that never happened in the case at bar.

"A qualified, base, or determinable fee (for I shall use the words promiscuously) is an interest which may continue forever, but the estate is liable to be determined without the

aid of a conveyance, by some act or event, circumscribing its continuance or extent. . . . It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, ..." 4 Kent's Commentaries, § 9.

See, also, 2 Blackstone's Commentaries, p. 109; 16 Cyc. 602; 11 Am. & Eng. Ency. Law (2d ed.), 368; *United States v. Reese,* Fed. Cas. No. 16,137.

Some of the authorities speak of the right of alienation as incidental to a base or qualified fee. We do not think, however, that the title in fee conveyed to Gordon failed by reason of said temporary restrictions on his right of alienation. The United States imposed such restrictions for the protection and benefit of the owner, and that they do not prevent a fee simple title is decided in *Libby v. Clark,* 118 U. S. 250, 6 Sup. Ct. 1045, 30 L. Ed. 133. See, also, *Porter v. Parker* (Neb.), 94 N. W. 123.

Although, as intimated in *Bird v. Winyer, supra,* the only immediate practical benefit arising from the title conveyed was to secure to the patentee and his family possession and use of said land until such time as the restrictions on alienation should be removed by the legislature of the state of Washington and by act of Congress, yet the estate actually conveyed was one of inheritance, being a base fee simple title, temporarily restricted as to alienation, and subject to forfeiture in the event of the patentee or his family failing to till the soil or upon their returning to nomadic habits of life. If, then, the fee title, subject to such restrictions, was granted to Napoleon Gordon, to whom did such title descend at the date of his death, in October, 1886? Neither Napoleon nor Sarah was then a citizen of the United States. They were still members of the Puyallup tribe. In *Jones v. Meehan,* 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, in a well-considered case, the following language is found, at page 29:

"The Department of the Interior appears to have assumed that, upon the death of Moose Dung the elder, in 1872, the title in his land descended by law to his heirs general, and

not to his eldest son only. But the elder Chief Moose Dung being a member of an Indian tribe, whose tribal organization was still recognized by the Government of the United States, the right of inheritance in his land, at the time of his death, was controlled by the laws, usages and customs of the tribe, and not by the law of the State of Minnesota, nor by any action of the Secretary of the Interior."

There is no allegation in the complaint pleading any usage or custom of the Puyallup tribe, nor can the courts take judicial notice thereof. It seems to be conceded by appellants and respondent that, as regards real estate, the Puyallup tribe of Indians had no rule of descent. The tribe, however, was still in existence when Napoleon Gordon died. The title necessarily descended to some person. In determining what became of it, we must look to the terms of the treaty in pursuance of which the patent was issued. It provides that the President of the United States may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. It is evident from this provision, and from the entire body of the treaty, that the allotment was made for the benefit of the family. It does not appear that the President ever prescribed any such rules or regulations. In the case at bar, none were necessary, as Sarah was the only remaining member of the family, and would be entitled to succeed to any estate or title, held by Napoleon Gordon under his patent, and of which he died seized. In the absence of adoption of any such rules or regulations, or of any showing as to the customs of the tribe, we are compelled to follow the laws of descent of this state, provided they do not conflict with any of the terms of said treaty or patent, which in this instance they do not. In our opinion, the law of descent of community property would more properly apply, and under such laws of descent the land would go to Sarah. This rule is applied by us by reason of necessity, and to carry out the evident purpose of the treaty in securing said estate to the

family, and not because we undertake at this time to decide either that the land was community property, or that while the tribal relations still existed the laws of descent of this state applied to these Indian lands.

A general act of Congress providing for allotments of Indian lands was passed and approved February 8, 1887, chapter 119, 24 Stat. 388. It is contended by respondent that, under the provisions of said act, the laws of descent in force in the state of Washington thereafter applied to these lands. We think this contention is well founded. By section 6 of said act Sarah Gordon, Annie Guyatt, Kitty Kautz, Nugent Kautz and August Kautz, all became citizens of the United States, and in pursuance of the doctrine announced in *Jones v. Meehan, supra,* the laws of descent of the state of Washington thereafter applied to these lands. Sarah Gordon died in the year 1897, after the enactment of said law. Respondent was her only heir and, under the laws of this state, inherited all the estate of her mother. On March 3, 1903, all restrictions on alienation under said patent were removed, in pursuance of acts of the legislature of the state of Washington and of Congress, thereby causing the title under said patent, theretofore a base fee, to ripen into an absolute fee, and such absolute fee simple title is now vested in the respondent, Annie Guyatt, free and clear of any claims of appellants.

The honorable superior court committed no error in overruling the demurrer. The judgment is affirmed.

Mount, C. J., Dunbar, Root, Rudkin, Fullerton, and Hadley, JJ., concur.

[No. 5877. Decided December 21, 1905.]

JOHN GRANTHAM, *Respondent*, v. A. S. GIBSON *et al.*, *Appellants*.[1]

NUISANCE — ABATEMENT — INJUNCTION—PLEADING—ALLEGATION OF DAMAGES. A complaint for the abatement of a nuisance by the maintenance of a shooting gallery and musical instruments sufficiently alleges substantial damages without stating any amount, where it appears that patrons of the plaintiff's rooming house have been driven away by the nuisance which, if not abated, will destroy the plaintiff's business.

SAME—INJURY TO BUSINESS—ACTION BY TENANT. An action to abate a nuisance can be maintained by the owner of a leasehold interest, where the injury done does not affect the freehold but works an injury to the business of the lessee, and where the complaint shows that the plaintiff has no adequate remedy at law.

APPEAL—REVIEW—OBJECTIONS NOT URGED BELOW. Upon appeal from a temporary injunction restraining the operation of a shooting gallery and certain musical instruments, it cannot be claimed that the injunction unnecessarily restrains the operation at all times of the day, where no request was made below to limit the injunction to certain parts of the day.

NUISANCE—ABATEMENT—TEMPORARY INJUNCTION—SUFFICIENCY OF SHOWING. The evidence sufficiently shows that the operation of a shooting gallery and musical instruments in the lower story of a building was specially injurious to the plaintiff, a tenant who used the upper stories as a hotel and rooming house, and amounted to a nuisance warranting a temporary injunction, where it appears that the operation of the defendants' business drove away the patrons of the plaintiff and kept him from obtaining others.

Appeal from an order of the superior court for Pierce county, Huston, J., entered April 28, 1905, in favor of the plaintiff, after a hearing on the merits, granting a temporary injunction to abate a nuisance. Affirmed.

Williamson & Williamson and *J. W. A. Nichols*, for appellants.

Harry H. Johnston, for respondent.

[1]Reported in 83 Pac. 14.

FULLERTON, J.—The respondent brought this action against the appellants to enjoin them from operating, in connection with their business, a shooting gallery and two certain musical instruments known respectively as a "tonophone" and an "orchestrion," alleging that their operation constituted a public nuisance specially injurious to himself. At the commencement of his action, the respondent applied for a temporary injunction restraining the appellants from operating the shooting gallery and the musical instruments until the rights of the parties could be determined by a trial upon the merits. Notice of the application was duly given and a hearing was had thereon, at which hearing the court granted the temporary injunction applied for. This appeal is from that order.

The appellants first attack the sufficiency of the complaint. It is contended that because the respondent neither alleged that he had suffered damages in any specific sum, nor demanded judgment for damages in any specific sum, in his complaint, the same is fatally defective, and insufficient to support a judgment or order of any kind. But we think the complaint sufficient to sustain an order for a temporary injunction. Aside from the fact that an injunction may be sued out to restrain the erection or creation of a merely threatened nuisance, there is in this complaint an allegation of substantial injuries, as well as a showing that the continuance of the acts complained of will work serious and irreparable injury to the respondent's business. It is alleged that the appellants and respondent are tenants in the same building; that the appellants exhibit pictorial views, enlarged and made attractive by electrical devices; that the respondent conducts a hotel and lodging house, and was first in the order of time, that the installation of these musical instruments and the shooting gallery by the appellants have already driven away some fourteen of his patrons, and will, if not abated, drive away the remainder and prevent him from obtaining others, to the ruin of his theretofore profit-

able business. These allegations, we think, show not only substantial damages already suffered, but that the respondent will continue to suffer substantial damages so long as these mechanisms are operated by the appellants.

It is next said that because the respondent has only a leasehold interest in the property his remedy lies in an action of damages for the wrongs done him, as no one but the owner of the fee can maintain a suit to enjoin the continuance of a nuisance. Were the nuisance complained of merely an injury to the freehold, it may be that this contention could be maintained, but here the nuisance alleged is one that works an injury to the business of the lessee, not an injury to the freehold, and his right to maintain an injunction must be determined by the character of the injury done him, and the effectiveness of his remedies at law, not upon the title by which he holds the property in which he conducts the businesss injured. The allegations of the complaint show that an action of damages would afford inadequate relief, and this is the measure of the complainant's right to maintain an action of injunction.

It is next complained that the injunction is too sweeping, in that it enjoins the appellants from operating the shooting gallery and musical instruments at all times, while it does not appear that the operation in certain parts of the day would seriously interfere with the respondent's business. But this question seems not to have been suggested in the trial court. There the contest was over the right of the respondent to an injunction at all, and the court was not asked to limit the operation of the injunction to certain parts of the day. For the reason that it was not suggested below, it will not be determined here.

Lastly, the appellants contend that the evidence was insufficient to justify the order. On this question we think there can be but little doubt. Manifestly the operation of the contrivances complained of at the place where the appellants operated them constituted a nuisance specially in-

jurious to the respondent. He was therefore entitled to have their operation enjoined, and the court did not err in so holding.

The order appealed from is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5834. Decided December 21, 1905.]

THE STATE OF WASHINGTON, *on the Relation of Marguerite Goupille, Plaintiff,* v. THE SUPERIOR COURT FOR KING COUNTY, *Defendant.*[1]

PROHIBITION—WHEN LIES—QUASHING GARNISHMENT—REMEDY BY APPEAL. Prohibition does not lie to prevent the superior court from quashing a writ of garnishment, inasmuch as there is a remedy by appeal staying all proceedings pending the appeal.

Application filed in the supreme court September 19, 1905, for a writ of prohibition, to the superior court for King county, Tallman, J., to prevent the discharge of a writ of garnishment. Denied.

Vince H. Faben, for relator.

Gill, Hoyt & Frye, for defendant.

FULLERTON, J.—On September 14, 1905, in a cause pending in the superior court of King county, in which Marguerite Goupille was plaintiff, and one Frank Chaput was defendant, the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of $7,305.75. Immediately upon the return being made, the plaintiff moved for, and obtained, a judgment against the defendant for the sum found to be due by the jury. Thereafter and on the same day, the plaintiff caused a writ of garnishment to issue on the judgment, against the Seattle Safe Deposit Vaults, Inc.,

[1]Reported in 83 Pac. 14.

requiring it to answer concerning such property subject to execution as it might have in its possession belonging to the defendant, which writ was served on the company on the same day by the sheriff.

On September 15, 1905, and within the time limited by statute in which motions for new trials can be filed, the defendant moved for a new trial in the cause in which the judgment against him was obtained, and at the same time moved that the court recall and cancel the writ of garnishment sued out upon the judgment, on the ground that the motion for a new trial suspended all proceedings upon the judgment, in garnishment or otherwise, until it should finally be disposed of. The trial judge took the view of the law contended for by the defendant, and announced his intention of recalling the writ of garnishment, whereupon the plaintiff applied to this court for a writ to prohibit him from so doing. An alternative writ of prohibition was issued on the application being made, and the question before us now is shall the writ be quashed or made permanent.

We think the alternative writ was improvidently issued, and must be quashed. Our statute provides that the writ of prohibition is the counterpart of a writ of mandate, and that it may be issued only in cases where there is not a plain, speedy and adequate remedy at law. In this case there is a plain, speedy and adequate remedy at law. If the relator feels aggrieved at the order of the court discharging the writ of garnishment, he can appeal therefrom, and can preserve the fruits of his garnishment pending the appeal by giving a bond superseding the order of discharge. *Tatum v. Geist*, 40 Wash. 575, 82 Pac. 912.

The writ is discharged.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5859. Decided December 21, 1905.]

ELWOOD W. MOYER *et al., Appellants,* v. LOUIS FOSS *et al., Respondents.*[1]

TAXATION—PAYMENT OF PART BY TENANT IN COMMON—TAX SALE—VALIDITY. Where a tenant in common, to whom the whole of certain lands were assessed, pays one-half of the taxes, and there is nothing on the record to show that he intended to pay only upon his half, which had been partitioned to him, the statute authorizing half payments in order to secure time on the balance, a sale of the whole premises for the other half of the taxes, after delinquency, is not void for want of a valid tax upon his interest; and failing to appear and defend the tax foreclosure, he is estopped to raise objection that the tax should have been adjudged to be a lien upon only the part of the tract partitioned to his cotenant.

SAME—ACTION TO SET ASIDE SALE—TENDER OF TAX. An action cannot be maintained by the owner of premises to set aside a tax sale without first paying or tendering the amount of the tax, penalties, and cost.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered June 9, 1905, upon findings in favor of the defendants, after a trial on the merits, dismissing an action to quiet title to lands sold for taxes. Affirmed.

Million & Houser and *Dave Hammack,* for appellants.

Smith & Brawley, for respondents.

FULLERTON, J.—On August 4, 1891, one William Munks, since deceased, held the legal title to certain lands situated in Skagit county, and on that date platted the same into lots and blocks, as "Munks' First Queen Anne Addition to Anacortes." Prior thereto he had entered into a contract to convey an undivided one-half interest in the land to the Seattle & Northern Railroad Company, and on August 10 of the same month, as a compliance therewith, conveyed to that company some eighty-three of the lots, being practically one-

[1]Reported in 83 Pac. 12.

half of the entire tract. The tract had theretofore been assessed for state, county, and municipal taxes for the year 1891, as the property of Munks, and was described on the assessment roll by legal subdivisions in accordance with the United States government surveys.

Later on, when the taxes matured, Munks paid to the county treasurer one-half of the amount assessed against the land. The remainder was suffered to become delinquent, and in due time a certificate of delinquency for the same was issued to the county of Skagit. The county foreclosed its certificate in 1903, and an undivided half of the property was sold in satisfaction of the amount due. At the sale the county itself became the purchaser, and later conveyed the interest so purchased to one Thomas Smith, who in turn conveyed to the respondents. Between the time of the assessment and the date of the sale thereunder, William Munks died, and the land was sold as a part of his estate to the appellants. After the conveyance to the respondents, this action was instituted by the appellants to quiet their title. Issue was taken on the allegations of the complaint and a trial had, at which the foregoing facts were made to appear. It appeared, also, that the appellants did not tender, or offer to pay, to the respondents, prior to the commencement of the action, or at all, the taxes for which the land was sold. On this fact appearing, the trial court ruled that the appellants could not maintain their action, and refusing to pass on the question of the legality of the tax sale, entered a judgment dismissing the action. This appeal is from the judgment of dismissal.

In the argument, both in their brief and at the bar, counsel for the appellants concede that, if this is an action to recover land sold for taxes, the appellants must fail, for want of having made the required tender, but they contend that it is not such an action, because there was no tax due on the interest of the appellants in the land at the time of the purported foreclosure and sale for which the land could be sold. They argue that a tax lien is analagous to the lien of a mort-

gage, a mechanics' lien, or that of a judgment, and that, when such a lien is created upon an undivided interest of a tenant in common in land and the land is afterwards partitioned among the tenants, the lien at once attaches to the part assigned the tenant against whose undivided interest it was a charge, and is no longer a lien on any part of the segregated interests of his cotenants. Consequently, in this case, when the grantor of the appellants paid one-half the taxes on the tract in question, he paid the taxes upon his own interest, leaving the unpaid remainder a lien upon the undivided interest of the railroad company, and when the land was afterwards partitioned, the unpaid portion of the taxes attached to the tract assigned to the railroad company. And it is concluded therefrom that there was no tax due upon appellants' portion of the property when the foreclosure and sale were had, and that such sale is therefore necessarily void.

It is true that in this state it is provided by statute that, where a partition of real property is made between tenants in common through the instrumentality of the courts, in a proceeding to which lien holders are made parties, all liens which had theretofore attached to the undivided interest of one of the tenants should thereafter be a lien only on the share assigned to such tenants; and that this court, in *Port v. Parfit,* 4 Wash. 369, 30 Pac. 328, applied the rule to a case where the partition was voluntarily made between parties holding lands as tenants in common. But it is plain that neither the rule of the statute nor the rule of the cited case meet the conditions here. At the time the land was assessed, there was nothing on the record to show that the railroad company had any interest in it. The title stood in the name of William Munks. The statute then provided that an owner of land might pay one-half of the taxes on his land before a certain date and receive a rebate of a certain per cent on the amount thereof, and have a given time to pay the remainder without the imposition of a penalty. When, therefore, Munks paid one-half of the taxes on this land, he did

nothing more than the statute permitted him to do, and hence there was nothing on the record, or in the acts of Munks, to charge the officers of the county with notice that Munks' interest in the property was different from what it appeared to be, namely, the entire interest, and they were justified in treating it as such. The sale, for this reason, was not void for want of a valid tax against Munks' interest. It may have been the right of the holder of the interest to come into the foreclosure proceeding and ask to have the unpaid portion of the tax adjudged to be a lien upon that part of the tract conveyed to the tenant in common on the partition of the property, but this is the extent of the right. On the face of the record, the tax was one for which the land sold was apparently bound. In such a case, the inquiry whether it is in fact bound must be raised in the foreclosure proceedings, else the party is estopped by the judgment of foreclosure from questioning the fact. *Smith v. Newell,* 32 Wash. 369, 73 Pac. 369; *Jefferson County v. Trumbull,* 34 Wash. 276, 75 Pac. 876; *Washington Timber & Loan Co. v. Smith,* 34 Wash. 625, 76 Pac. 267.

Inasmuch, therefore, as it is not made to appear that the tax was void on its face, the appellants cannot maintain an action to recover the land sold to satisfy the tax without first paying or tendering to the person claiming under the tax title the amount of the tax with interest, penalties and costs, for which the land was sold. Bal. Code, §§ 5678-5680; *Ward v. Huggins,* 16 Wash. 530, 48 Pac. 240; *Merrit v. Corey,* 22 Wash. 444, 61 Pac. 171; *Denman v. Steinbach,* 29 Wash. 179, 69 Pac. 751.

The judgment will stand affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5780. Decided December 21, 1905.]

M. M. TEATER, *Appellant,* v. TERRY KING, *Respondent.*[1]

APPEAL—DECISION—LAW OF CASE. Upon the second appeal of a cause the decision on the first appeal as to the sufficiency and competency of the same evidence introduced at the first trial is conclusive.

APPEAL—TRIAL DE NOVO—RECEPTION OF INCOMPETENT EVIDENCE—HARMLESS ERROR. Upon a trial *de novo* in the supreme court of an action at law tried without a jury, a case will not be reversed because of the reception of incompetent evidence where there was other competent testimony sustaining the findings.

UNLAWFUL DETAINER—EXPIRATION OF LEASE BEFORE FINAL TRIAL—RIGHT OF DEFENDANT TO JUDGMENT FOR COSTS. Upon a finding in favor of the defendant in an action of forcible entry and detainer, in which the final trial does not occur until after the expiration of the defendant's lease, judgment that the defendant was rightfully in possession at the time of the commencement of the action, and that he recover his costs, is proper.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 3, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of unlawful detainer. Affirmed.

Shank & Smith, for appellant.

Allen, Allen & Stratton, for respondent.

HADLEY, J.—This is an action for unlawful detainer. The cause was once before here on appeal. *Teater v. King,* 35 Wash. 138, 76 Pac. 688. The facts are stated in that opinion, reference to which is hereby made to avoid repetition. The case went to trial the first time before a jury, and the plaintiff moved for a directed verdict, and for judgment in his favor, which motion was granted by the trial court. This court reversed that ruling, and remanded the cause for a new trial. The cause was tried a second time before the court

[1]Reported in 83 Pac. 8.

without a jury, and findings of facts and conclusions of law were entered. Judgment was rendered for the defendant, and the plaintiff appealed.

The first assignment of error is that the trial court erred in finding that appellant is bound by the lease from Mrs. Dodds to Spores and Gavin. Upon the former appeal it was held that the evidence bearing upon this subject sufficiently sustained the answer to require its submission to the jury, and that it was error to hold otherwise, as a matter of law. The evidence was discussed in the former opinion, and it was to the same effect at the second trial. We think the court's finding upon that fact at the second trial is sustained by the evidence, and should not be disturbed.

The second assignment is that it was error to admit evidence and make findings regarding the ratification of the Spores and Gavin lease by Carraher, the executor of the estate owning the premises. The competency of this evidence was recognized in the former opinion, and the finding here is amply supported by the evidence. The same is also true of the finding that respondent had the same rights that Spores and Gavin originally had.

The next assignment is that the court erred in considering a certain conversation between the parties when rent for the following month was paid. Without discussing that evidence, it is sufficient to say that, even if it were incompetent, there is sufficient other evidence to sustain the judgment, and in such case, where this court is trying the case *de novo*, it will not reverse a judgment merely because incompetent evidence may appear in the record. Only the competent evidence will be considered, and if there is sufficient such to sustain the judgment, it will not be reversed. *Jefferson County v. Trumbull*, 34 Wash. 276, 75 Pac. 876; *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970; *Muir v. Westcott*, 34 Wash. 463, 75 Pac. 1107.

The last contention is that the court erred in entering judgment for the respondent. At the time of the last trial, the

lease under which respondent held had expired, and it is argued that, as he was no longer entitled to possession, he was not entitled to judgment. The judgment does not in terms award him present possession. The essential part of it is as follows:

"It is adjudged and decreed that the defendant Terry King, at the time of the commencement of this action, was entitled to the possession of the property described in the plaintiff's complaint herein, . . . and it is further ordered and adjudged that the plaintiff herein, M. M. Teater, take nothing by his complaint, and that the defendant Terry King have and recover of and from the plaintiff his costs and disbursements in this action . . ."

We think the respondent was entitled to such a judgment, and the court did not err.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5851. Decided December 22, 1905.]

ANGIE B. COLLINS *et al., as Executors of the Last Will of John Collins, Deceased, Respondents,* v. DENNY CLAY COMPANY *et al., Appellants.*[1]

APPEAL—REVIEW—COMPLAINT—AMENDMENTS. Where proofs were received without objection, the complaint will on appeal be considered amended to conform thereto.

EVIDENCE—CORPORATE STOCK—VALUE. Upon an issue as to the value of the stock of a corporation whose sole object was to hold lands, the value of the lands is competent to show the value of the stock.

EVIDENCE—COMPROMISE—SIMILAR TRANSACTIONS. Upon an issue as to the settlement of accounts, evidence of the settlement of another controversy is inadmissible where the parties were not the same and one settlement did not influence the other.

[1]Reported in 82 Pac. 1012.

CHATTEL MORTGAGES—ACCOUNTING—EVIDENCE—BURDEN OF PROOF. Upon an accounting in an action to redeem a mortgage of stock held as security, the burden of proof is upon the mortgagee to show the amount of dividends received by it on the stock to be credited on the debt.

SAME—ABSOLUTE SALE A MORTGAGE—EVIDENCE—RELEASE OF EQUITY OF REDEMPTION. The evidence is sufficient to establish that an absolute sale of corporate stock in consideration of the discharge of a settled account, accompanied by an option to repurchase the stock within a specified time, was intended as a mortgage to secure the debt, where it appears that the relation of debtor and creditor had existed for some years, that the debtor was insolvent, that the total indebtedness was less than $8,000 and the value of the stock conveyed exceeded $27,000, and the short period of four months was allowed to the debtor in which to pay the indebtedness and reclaim the stock; since, where the consideration is grossly inadequate, the courts will look with disfavor upon any relinquishment of the right of redemption, and hold that the original relation continues.

JUDGMENT—PARTIES BOUND—SURPLUSAGE. Parties cannot object that a judgment regular as to them is void because also against their assigns, who are not bound thereby, since that may be treated as surplusage.

EXECUTORS AND ADMINISTRATORS — ASSETS — TITLE — TRUST PROPERTY—EVIDENCE—PRESUMPTIONS. Where it was conceded that stock belonging to the plaintiff was held by a decedent in trust, and came into the hands of the defendants as executors of such decedent's estate, it will be presumed that the ownership continued the same, in the absence of evidence to the contrary.

EXECUTORS AND ADMINISTRATORS—LIABILITY TO THIRD PERSON—ELECTION—JUDGMENT—FORM—ENFORCEMENT. Where executors apply to the use of the estate money or proceeds belonging to a third person, they are liable both in their individual and representative capacity, and the owner having elected to hold them in their representative capacity, the judgment must be in accordance with Bal. Code, §§ 5697, 6239, providing for payment in due course of administration, and not by execution.

ACCOUNTING—STOCK HELD AS SECURITY—VALUE AT DATE OF TRIAL. In an action to secure a return of corporate stock or its value, which had been pledged to secure a debt, and had passed into the hands of executors of the pledgee charged with the trust, the plaintiff is entitled to the value at the date of the trial.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 6, 1905, upon findings in

favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform an agreement as a mortgage and for an accounting. Modified.

Blaine, Tucker & Hyland, for appellants.

James F. McElroy and *William Martin,* for respondents.

RUDKIN, J.—On and prior to the 11th day of November, 1897, John Collins, now deceased, was indebted to the defendant Denny Clay Company in the sum of $2,517.19, with interest thereon at the rate of ten per cent per annum from February 5, 1894. This indebtedness was secured by a pledge of three hundred and forty shares of the capital stock of the defendant McNaught-Collins Improvement Company, of the face or par value of $34,000. At the same time Collins was also indebted to A. A. Denny, now deceased, in the sum of $4,325. On said 11th day of November, 1897, Collins and the Denny Clay Company, through A. A. Denny, its president, entered into the following agreement:

"This agreement, made and entered into this eleventh day of November, 1897, by and between the Denny Clay Company, the party of the first part, and John Collins, the party of the second part: Witnesseth, that, whereas, the party of the first part has commenced an action against the party of the second part in the superior court of the state of Washington, in and for the county of King, said cause being numbered 24133, for the purpose of recovering judgment against the party of the second part, in the sum of two thousand five hundred seventeen and 19-100 dollars, with interest thereon from the 5th day of February, 1894, at the rate of ten per cent per annum, upon a settled account, and for the purpose of foreclosing a pledge of three hundred and forty shares of the stock of the McNaught-Collins Improvement Company, of the nominal value of $34,000. And, whereas, said party of the first part is about to take judgment in said suit;

"Now, therefore, in consideration of the dismissal of said action and in satisfaction of the claim sued upon in said action, the party of the second part does hereby sell, assign and set over unto the party of the first part said stock as

the absolute property of the party of the first part, and as a complete settlement of the indebtedness due by the party of the second part to the party of the first part upon said settled account sued upon in said action No. 24133. The party of the first part is to dismiss said action at its own proper costs, and the party of the second part is to assign said stock to the party of the first part in the form prescribed by the by-laws of the McNaught-Collins Improvement Company.

"It is further agreed that the party of the second part shall have the privilege of purchasing said stock from the party of the first part, provided the party of the second part shall pay to the party of the first part, on or before the 15th day of March next, the sum of three thousand five hundred fifty-seven and 54-100 dollars, and any and all assessments which in the meantime may be levied upon said stock, or which the party of the first part may advance for the protection of said stock, or the property of the McNaught-Collins Improvement Company. And provided further, that the party of the second part shall pay to one A. A. Denny the sum of four thousand three hundred twenty-five dollars, and interest thereon from this date, as evidenced by a promissory note of this date, made, executed, and delivered by the party of the second part to A. A. Denny.

"In case the party of the second part shall fail to make either of said payments, to wit, the payment of said three thousand five hundred fifty-seven and 54-100 dollars by the 15th day of March next, and any and all assessments or advancements made by the party of the first part for the protection of the stock or property of the McNaught-Collins Improvement Company; or said note, in the sum of four thousand three hundred and twenty-five dollars, that this right to purchase on the part of the party of the second part shall be at an end. It is further agreed that in case any dividend shall be declared and paid upon said stock that the same shall be deducted from the purchase price thereof under this agreement. It is further agreed, that in case the party of the second part shall fail to purchase said stock, that he shall be liable on said note, according to its terms and conditions."

On the day following the execution of this agreement, the three hundred and forty shares of stock were surrendered to the McNaught-Collins Improvement Company, and reissued

to A. A. Denny, and have at all times since been held by the said Denny or the executor of his estate. This action was brought by the executors of the Collins estate against the executor of the Denny estate, and others, to declare the above agreement a mortgage or pledge, to enforce the right of redemption, and for an accounting. The court found, among other things, that the stock in controversy was of the value of $27,880, at the date of the execution of the above agreement, and of the value of $102,000, at the date of trial; that, at the time of the commencement of this action, the principal and interest due on the A. A. Denny note and the Denny Clay Company note, aggregated $12,511.80; that dividends were paid on said stock to the executors and assigns of the Denny estate, aggregating $21,960.83, or $9,499.03 in excess of the amounts due on the two notes. The court further found that the stock was transferred as security only, and was to be returned to Collins on the payment of the indebtedness secured thereby.

On these findings the court entered its decree directing the executor of the Denny estate and his assigns to assign and surrender the stock in controversy to the plaintiffs, enjoining the defendants from incumbering or disposing of the same, and directing the defendant McNaught-Collins Improvement Company to cancel said certificate of stock, and reissue the same to the plaintiffs. It was further decreed that, in case it should thereafter be made to appear that the defendant executor, or the defendants Denny Clay Company or Denny Estate, Inc., had sold, disposed of, or incumbered said stock, or placed it beyond their power or control to surrender the same since the commencement of this action, the plaintiffs, upon such showing, should have personal judgment against the executor and assigns for the sum of $102,000, the value thereof, and jurisdiction was reserved for the purpose of rendering such judgment. It was further decreed that the A. A. Denny note and the Denny Clay Company note be canceled; that the defendant executor and the defendant

Denny Estate, Inc., be required to account to the plaintiffs for the sum of $9,449.03, and that the plaintiffs recover judgment against the executor for said sum. From this judgment the defendants appeal.

Objection is made to the sufficiency of the complaint to sustain the judgment, as rendered against some of the appellants, but the proofs were received without objection, and this court will consider the complaint amended, if need be, to conform to the facts proved. Objection is also made to the sufficiency of the testimony to sustain the findings of the court as to the value of the stock of the McNaught-Collins Improvement Company, at the time of the execution of the agreement in controversy, and also as to the amount of dividends paid thereon. Objection is also made to the competency of certain evidence received for the purpose of showing the value of the stock, and the competency and materiality of certain evidence excluded. In view of the fact that the sole object of the McNaught-Collins Improvement Company was to hold certain tide lands, evidence as to the value of its holdings would seem competent for the purpose of fixing the value of its stock. The corporation was not engaged in business of any kind, and the aggregate value of all its stock would be approximately the value of its property, less the amount of its indebtedness. Evidence as to the settlement of another controversy between Collins and other parties, on the one part, and Denny on the other part, at or about the same time, was properly excluded. The parties were not the same, and it was not shown that one settlement entered into or influenced the other. We fully recognize the difficulty of fixing the market value of such property at the time the agreement in question was entered into; but the finding of the court as to such value seems to be well within the testimony; and inasmuch as the stock was turned over in satisfaction of a debt that slightly exceeded $3,000, the result of this action would be the same had the court found the value to be much less than it did. The finding as to the amount of dividends

paid is fully sustained by the testimony. The burden was on the appellants to account for such dividends, and to establish any proper disbursements made on account of the stock. This they wholly failed to do. The finding as made, if objectionable at all, is too favorable to appellants. The court allowed interest on the notes up to the commencement of the action, but no interest on the dividends received.

The only remaining question is the correctness of the finding or conclusion that the transaction in question was a mortgage or pledge. This is a mixed question of law and fact, and both parties agree that whether a conveyance be a mortgage or a conditional sale must be determined by a consideration of the peculiar circumstances of each case. All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption at the time of giving the mortgage. *Bradbury v. Davenport,* 114 Cal. 593, 46 Pac. 1062, 55 Am. St. 92; *Plummer v. Ilse, ante* p. 5, 82 Pac. 1009. While a mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement, yet the courts view such agreements with distrust and disfavor, and if it appears that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue. Applying these rules in the case at bar, it appears that the relation of debtor and creditor existed between Collins and Denny and the Denny Clay Company, at the time the agreement in question was entered into, and had so existed for some years before. Collins was insolvent, owing in all about $200,000. The total indebtedness included in the two notes was less than $8,000, and the total indebtedness actually released less than $3,500. The value of the property surrendered, as found by the court, exceeded $27,000, and the short period of four months was allowed an insolvent debtor to pay the indebtedness and reclaim the stock. We doubt if any authority can be found to sustain such a transaction.

In *Russell v. Southard,* 12 How. 139, 13 L. Ed. 927, the disparity between the value of the property and the amount of the mortgage debt was not so great as in this case; the agreement relied on was just as binding and just as explicit as in the case at bar, and in other respects the equities in favor of the mortgagor were not as strong as those found here. In respect to the adequacy of the consideration, the court in that case, speaking through Mr. Justice Curtis, said:

"In examining this question it is of great importance to inquire whether the consideration was adequate to induce a sale. When no fraud is practiced, and no inequitable advantages taken of pressing wants, owners of property do not sell it for a consideration manifestly inadequate, and, therefore, in the cases on this subject great stress is justly laid upon the fact that what is alleged to have been the price bore no proportion to the value of the thing said to have been sold."

Again, speaking of the written memorandum, the court said:

"In respect to the written memoradum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform. But it is not to be forgotten that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the court to watch vigilantly these exercises of skill, lest they should be effectual to accomplish what equity forbids; and that, in doubtful cases, the court leans to the conclusion that the reality was a mortgage and not a sale;"

citing a number of cases. Again:

"It is true, Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers, in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court of equity does not consider a consent, thus obtained, to be sufficient to fix the rights of parties. 'Necessitous men,' says the Lord Chancellor in *Vernon v. Bethell,* 2 Eden 113, 'are not, truly speaking, free

men; but, to answer a present emergency, will submit to any terms that the crafty may impose upon them.' The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken; but it is settled that this circumstance does not make the conveyance less effectual as a mortgage;" citing cases. "And consequently it is not only entirely consistent with the conclusion that a mortgage was intended, but in a case where it was the design of one of the parties to clothe the transaction with the form of a sale, in order to cut off the right of redemption, it is not to be expected that the party would, by taking personal security, effectually defeat his own attempt to avoid the appearance of a loan."

The above is a leading case on the question under consideration, and has been followed and approved in a multitude of cases in both the state and federal courts. See, 5 Rose's Notes, U. S. Reports, p. 77, and cases cited. The conclusion of the trial court that the stock stood as security only is amply sustained by the authorities.

Numerous objections are urged against the form and substance of the decree. It is certainly open to criticism, but this does not necessitate a reversal unless it injuriously affects some substantial rights of the appellants. That portion of the decree which runs against the *assigns* is probably void for uncertainty. It is at least void as to assigns not before the court, as they would be entitled to be heard, before judgment could be taken against them. But this part of the decree may be rejected as surplusage without affecting the rights of parties properly described therein.

It appears from the testimony of appellants themselves that this stock stood in the name of A. A. Denny from November 12, 1897, until the time of his death, and in the name of A. A. Denny Estate from thence until July 2, 1904, and no change appears after that date. In the absence of proof, we will presume that the ownership continued the same. It further appears that all dividends paid on the stock were received by A. A. Denny or by the Denny Estate. It is con-

tended that, if the executor converted this stock, or wrongfully received dividends thereon which belonged to others he is liable in his individual and not in his representative capacity. This stock stood in the name of the decedent at the time of his death, and came into the hands of his executor as a part of his estate. Under such circumstances the more equitable rule is that if the executor or administrator applies to the use of the estate money or the proceeds of property belonging to a third person, he is liable in both his individual and representative capacity, and the injured party may elect whether he will hold him in the one capacity or the other. Respondents elected to pursue the executor in his representative capacity, as they had a right to do; but having followed that course, they can only take such judgment as the law authorizes in such cases. By Bal. Code, § 6239,

"The effect of any judgment rendered against any executor or administrator shall be only to establish the claim in the same manner as if it had been allowed by the executor or administrator, and the court; and the judgment shall be, that the executor or administrator pay, in due course of administration, the amount ascertained to be due, but no execution shall issue upon such judgment, nor shall it create a lien upon the property of the estate, or give the judgment creditor any priority of payment."

By Bal. Code, § 5697, the judgment is not deemed to be evidence of assets in the hands of the personal representative, unless assets are alleged. The judgment against the executor will be modified to conform to the above provision.

It is further objected that the value of the stock should have been fixed as of the date of conversion, and not as of the date of trial. This is not an action to recover damages for the conversion of property, nor is any conversion shown. If the stock stood in the name of the decedent as security, it came into the hands of his personal representative charged

with the same trust, and still stands as security. The court properly fixed the value as of the date of trial.

The remaining objections to the decree arise from the erroneous assumption that the burden of proof to establish certain facts rested upon the respondents. We find no error in the record, except as to the form of the judgment against the executor. The judgment against him will be so modified as to be made payable in due course of administration, as prescribed by Bal. Code, § 6239, *supra,* and any judgment hereafter rendered against the executor in the court below will conform to the same statute. As thus modified, the judgment is affirmed. The respondents will recover their costs here.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5757. Decided December 22, 1905.]

BUFFALO PITTS COMPANY, *Respondent,* v. GEORGE W. SHRINER, *Appellant.*[1]

CONTRACTS—WARRANTY—EVIDENCE—ORAL REPRESENTATIONS—CONTRADICTING WRITING. When a written order for the sale of a second-hand threshing outfit was signed and sent to the vendor, containing the express stipulations that the warranty therein did not cover second-hand machinery, and that no verbal agreements would be recognized or allowed by the vendor, the same cannot be contradicted by oral evidence of false representations by the agent of the vendor respecting the character and quality of the machinery or by the agent's oral warranty thereof, where there was no clear and satisfactory evidence that the vendee was overreached and it is admitted that he knew the contents of the writing.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered February 9, 1905, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on promissory notes and to foreclose a chattel mortgage. Affirmed.

[1]Reported in 82 Pac. 1016.

Merritt & Merritt, for appellant.

James A. Williams and *Denton M. Crow,* for respondent.

Root, J.—On May 7, 1903, appellant signed and delivered to an agent of respondent a written order for the purchase of a second-hand threshing machine, engine, and appurtenances. This order was in the usual form supplied by agents of the company to intending purchasers, and embodied certain printed warranties, but contained the following:

"This order is subject to the acceptance and approval of said company at its home office, and when so approved and accepted is a binding contract which no person has authority to modify or vary in any respect, or to waive any of its conditions, except in writing approved by the management at the home office. . . . This form of contract is furnished in duplicate; see that you have a copy of it and keep it for reference. This warranty does not cover second-hand machinery sold. All the conditions of this sale must appear on the within order, as no verbal agreements of whatever nature will be recognized or allowed. . . . I herewith declare that I have carefully read this order and am acquainted with its contents, which I herewith accept."

This order, which became the contract of purchase, is set forth in the pleadings. The order was forwarded to the home office of the company, where the latter accepted it, and the sale was consummated and the machinery delivered on June 3, 1903. Seven promissory notes, secured by mortgage, were given by appellant to cover deferred payment. Appellant used said threshing outfit for the season of 1903, and until about September 1, 1904. After the close of the 1903 threshing season, appellant paid two of said promissory notes. On October 22, 1904, respondent commenced this action to foreclose said mortgage and collect upon said unpaid notes. To the complaint appellant interposed an answer, admitting the contract, notes, and mortgages, and the nonpayment of the notes, but setting up an affirmative defense, alleging that

various guaranties and warranties concerning said machinery were made by respondent and had failed; and for a second affirmative defense and counterclaim, appellant alleged that respondent had warranted and guaranteed said machinery, and that he, in reliance upon said guaranty and warranty, which had failed, paid two of the notes, and demanded judgment for said amount thus paid. Respondent replied, denying the allegations of the affirmative defenses.

At the trial, respondent objected to the introduction of any evidence in support of appellant's affirmative defenses. The trial court sustained this objection. Appellant then asked permission to amend its answer by alleging that he was induced to enter into the contract of purchase, and execute the notes and mortgage, by reason of the false and fraudulent representations made orally by respondent's agent as to the construction, character, material, and quality of the machinery, and by reason of said agent having orally represented that respondent would warrant and guarantee the material, construction, quality, and performance of said machinery. The court refused to permit this amendment, for the reason that he deemed it to constitute no defense. Judgment and decree was entered as prayed for in the complaint. Appeal is taken therefrom.

The rulings of the trial court as to the affirmative defenses and the requested amendments are the only questions presented for our consideration. We think these rulings were right. It is a general rule of law that statements made during the negotiations which culminate in a written instrument cannot be admitted to contradict or defeat such instrument. An exception, or apparent exception, to the rule arises in those cases where, by fraud, misrepresentation, undue influence, or overreaching, a party is induced to sign or execute a written instrument. But the evidence of such improper influences must be clear and satisfactory. In the case at bar, it is not contended that appellant did not know what was in the instrument he signed. Upon the oral argument his

counsel, in answer to a question, stated that there was no such contention. He therefore knew that the written contract contradicted what he alleges the agent told and represented to him. The written order or application stated plainl that the warranty therein did not apply to *second-hand* machinery.

It also contained the following statement: "All the conditions of this sale must appear on the written order *as no verbal agreements of whatever nature will be recognized or allowed.*" (Italics ours.) Knowing of these statements in this order and contract, which he signed and which he states he carefully read, how can he be heard to say that the oral representations of the agent, made beforehand, induced him to sign said order and to subsequently execute the notes and mortgage in payment for the machinery? This instrument told him the company would not be bound by anybody's representations except those contained in that identical document. He knew all this before the purchase was consummated or the notes or mortgages executed. Written instruments would be of little value if they could be overthrown upon such a showing as this. The fact that appellant used the machinery for two seasons, and paid two of the notes after fully testing it, does not tend to strengthen his cause.

The judgment and decree of the trial court is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, HADLEY, and RUDKIN, JJ., concur.

CROW, J., having been of counsel, took no part.

[No. 5740. Decided December 22, 1905.]

A. J. THOMAS *et al., Respondents,* v. LINCOLN COUNTY, *Appellant.*[1]

APPEAL — JURISDICTION — AMOUNT IN CONTROVERSY — LEGALITY OF TAX. A judgment against a county in favor of a taxpayer for the amount of an excessive tax in the sum of $64.56, does not affect the "legality" of a tax, within Const., art. 4, § 4, giving the court jurisdiction in such event in cases involving less than $200, where the question arose through a mere mistake of the assessor in entering the number of acres in the tract, and there was no question as to lack of power to levy the tax, or any controversy as to any rule or construction of law.

Appeal from a judgment of the superior court for Lincoln county, Poindexter, J., entered March 30, 1905, in favor of plaintiffs, in an action to recover excessive taxes paid under protest. Appeal dismissed.

R. M. Dye, for appellant.

H. A. P. Myers, for respondents.

ROOT, J.—Respondents instituted this action to recover taxes paid under protest. The complaint contains two causes of action. By the first it appears, that respondents are, and ever since the year 1900 have been, the owners of a certain section of land which contained 761.66 acres, and no more; that for each of the years 1900, 1901, 1902, and 1903, the taxing officers of the appellant county assessed this section of land as containing 859.08 acres; that respondents paid the taxes so assessed in the year 1900, by mistake and without knowledge that the section contained a less number of acres than 859.08; that thereafter they paid their taxes each year under protest as to the amount now claimed to be excessive; but it is not shown that they ever appeared before the board of equalization or in any manner endeavored to have the assessment roll corrected. The second cause of ac-

[1]Reported in 83 Pac. 18.

tion is based on a similar claim assigned by George W. Thomas and wife to respondents. The total amount of excessive tax, alleged by respondents to have been paid by them and their assignors during said years, was the sum of $64.56, in which amount judgment was awarded them on the trial of this cause in the superior court. From this judgment the county appeals.

Respondents move to dismiss this appeal for the reason that the amount involved is less than $200. Appellant has filed no reply brief, but doubtless relies upon the exception in the constitution, which permits an appeal to be taken to this court where the case involves the legality of a tax or assessment, even though the amount involved be less than $200. Neither party has furnished us any citation of authority upon the question involved in this motion to dismiss. The question appears never to have been before this court.

We think the motion must be granted. We do not think the expression "legality of a tax" comprehends such a question as is presented in this case. Here the difficulty arose from the county assessor having entered this section of land upon the assessment roll as containing 859.08 acres, whereas it contained only 761.66. The roll being returned with this number of acres set forth therein, the usual proceedings were taken by the county officials, which culminated in respondents being taxed for a larger acreage than they in reality owned. We think this was an error of fact and not of law. There was no contention that the land of respondents was not subject to taxation. There was no contention that a higher rate of levy was made than the law justified. There was no contention that property was assessed which was by law exempt. There was no lack of power to assess and levy a tax. There as no contention that any of the proceedings appertaining to the assessment or levy were made other than as, or different from those, provided by law. The controversy did not rise from a difference of opinion on any ques-

tion relating to the subject-matter, or as to any rule or construction of law; but the whole controversy took its inception from the mistake of the assessor in entering the amount of respondents' acreage in the assessment roll. This was a mistake that could and should have been called to the attention of the assessor, the county commissioners, or the board of equalization, and corrected by some of these officials. Neither the omission to do or have this done, nor the error in entering the number of acres erroneously, in our opinion, presented to the lower court a question affecting the "legality" of a tax or assessment, as that term is employed in § 4 of art. 4 of the state constitution, and in Bal. Code, § 4650. We have been unable to find any authorities exactly in point, but believe that the following have a tendency to support the conclusion we have reached: *Hansen v. Nilson,* 17 Wash. 606, 50 Pac. 511; *Brown v. Rice,* 52 Cal. 489; Cooley, Taxation (2d ed.), p. 748; *Favrot v. Baton Rouge,* 38 La. Ann. 230; *State ex rel. Badger v. Recorder of Mortgages,* 41 La. Ann. 533; *Mason v. Gamble,* 21 How. 390, 16 L. Ed. 81; *Tebault v. New Orleans,* 108 La. 686, 32 South. 983; *Rocheblave Market Co. v. New Orleans,* 110 La. 529, 34 South. 665. The motion to dismiss is granted.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 5768. Decided December 26, 1905.]

LAWRENCE WHELAN, *Respondent*, v. WASHINGTON LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—FACTORY ACT—ASSUMPTION OF RISK. Under Laws 1903, p. 40, requiring factory and mill owners to use proper belt shifters, failing to do so is negligence *per se*, and where this is not done an employee assisting in removing a belt does not assume the risk of injury therefrom.

SAME—BELT SHIFTERS—WHEN NECESSARY. The factory act requiring the use of "proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys," was not intended to require shifters only in proper or necessary places, but requires "sufficient" belt shifters in all cases; and it could rarely if ever be left to the jury to say whether any belt shifter or other device was necessary in a given case.

SAME—SUBMISSION OF QUESTION TO JURY. Where there is conflicting evidence upon an issue as to whether shifting devices for the throwing on or off of belts could have been effectively maintained, and the jury find the issue in favor of the plaintiff, under instructions submitting such issue, the defendant cannot claim that the plaintiff assumed the risk from the fact that the shifters were unnecessary and the factory act not violated.

DAMAGES—WHEN NOT EXCESSIVE. A verdict for $6,000 for personal injuries to the ankle joint, resulting in the extraction of pieces of bone, a large hole which was a discharging sore up to the time of the trial, and a stiff joint or permanent anchylosis, is not excessive.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered January 5, 1905, upon the verdict of a jury, rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by an employee in a sawmill in removing a belt from a revolving shaft. Affirmed.

James M. Ashton and *W. H. Hayden*, for appellant.

Govnor Teats, for respondent.

[1]Reported in 83 Pac. 98.

HADLEY, J.—This is an action to recover damages for personal injuries. Plaintiff was, at the time he received his injuries, in the employ of the defendant, and his duties were those of attending to a cut-off saw. The saw was operated by means of a belt extending upward from a pulley attached to the saw, the belt being also connected with a pulley above. The latter pulley was run by means of another to which was attached a power belt connecting with the main shaft, which was propelled by steam power in the mill. The belt at the saw had become unlaced, and was liable to be caught so as to cause injury to the plaintiff. No belt shifters were provided, and this belt could not be repaired without stopping the entire mill or removing the power belt above. Plaintiff notified the head sawyer of the situation, and the latter caused the mill to be stopped.

About this time the foreman appeared, and the plaintiff testified that the foreman then ordered him to go up and remove the power belt. The foreman says he told him to remove the saw belt. The plaintiff is corroborated by another witness who says he heard the order, and that he and the foreman stood together and watched plaintiff while the latter was attempting to remove the power belt. Plaintiff ascended a ladder and stood upon a plank above for the purpose of reaching the power belt. He descended to get a stick to assist in the removal, and then returned to the position above. Meantime the mill was started by direction of the foreman, and plaintiff says it was running at about half its ordinary speed. He says he understood that it was thus started and run at the reduced rate of speed for the purpose of assisting him in the removal of the belt, as some motion was necessary in order to effect the removal. While attempting to remove it by the aid of the stick, he was caught and injured. He alleges in his complaint that the defendant was negligent in not providing a proper belt shifter or other mechanical contrivance for the removal of the belt. The answer alleges that the plaintiff assumed the risk of the danger, and

that his injuries were due to his contributory negligence. A trial was had before a jury, and a verdict was returned for plaintiff. From a judgment entered upon that verdict, the defendant is prosecuting this appeal.

A large part of appellant's brief is devoted to a discussion of its contention that the court erred in not holding, as a matter of law, that respondent assumed the risk of the danger. Section 1, of chapter 37, of the Laws of 1903, p. 40, provides as follows:

"That any person, corporation or association, operating a factory, mill or workshop where machinery is used, shall provide and maintain in use proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys."

Respondent alleges negligence of appellant in not complying with the requirements of the statute. Appellant argues that, inasmuch as respondent had full knowledge of the situation, he waived the requirements of the statute and assumed the risk of the danger. Since appellant's brief was written, the case of *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, was decided. In that case it was held that the provisions of the statute above cited cannot be waived by an employee. A similar holding with reference to another statute of like effect was made in *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. It is unnecessary at this time to review the arguments of those cases, for the reason that we regard the question now raised by appellant as settled against its contention. Under the above decisions, it was negligence *per se* for defendant to fail to maintain proper belt shifters, and respondent could not waive the statute and assume the risk of the danger consequent upon such neglect.

It is further contended that, notwithstanding the statute, if a belt shifter was not necessary or practicable, then respondent assumed the risk, and that it should have been left to the jury to say whether it was necessary or practicable to provide such a device at the place in question. The legisla-

ture has left little room in the premises for the exercise of discretion of mill operators, or of judgment on the part of juries. The statute was manifestly intended for the protection of life and to prevent the mangling of human bodies. To that end the legislature sought to make the protection as complete as such devices can make it. It did not say that belt shifters shall be maintained where necessary, and leave mill operators and juries to say when the necessity exists. The term "proper belt shifters," as used in the statutory connection, does not merely mean belt shifters in proper or necessary places, but rather *sufficient* "belt shifters or other mechanical contrivances" to effect the "throwing on or off belts on pulleys." There is no classification of pulleys or places as to the matter of necessity or practicability; and it was the manifest theory of the law-makers that, when belts have been placed upon any pulleys for the purpose of operating machinery, the necessity for removing and replacing them will at some time arise; and that, in order to guard against danger from an attempt to shift them while in operation, some effective contrivance must be maintained for that purpose.

It certainly must be conceded that the contrivances must be maintained at all places where belts are shifted while in operation, in order to exempt the mill owner from the charge of negligence. The shifting of some belts while the machinery moves may seldom occur, but it is upon those rare occasions that the protection is needed. We are not now prepared to say that occasion may *never* arise when a question of this character may be proper for a jury, although it seems to us that, under this statute, such occasions must be very rare. To open the way for controversies as to whether the protection designated by the statute is or is not necessary or practicable in given places would lead to much litigation which might result in the nullification of the very purpose of the statute. Such statutes are mandatory, and it is not for the mill owners or juries to say whether the requirements are wise or necessary. Passing upon a similar principle, the

supreme court of Montana, in *State v. Anaconda Copper-Min. Co.*, 23 Mont. 498, 59 Pac. 854, said:

"The contention that the court erred in excluding evidence offered to show that the devices or cages required by the amended law would be dangerous, and apt to result in accidents, must fall also. The text of the law discloses a measure designed to guard against the dangers incident to lowering and elevating men in deep mining shafts. Whether the cased-in cage and its appliances is the best or wisest method was a question for the legislature to decide."

But what may have been appellant's absolute right in this regard in the case before us we need not determine, since we think the question was actually submitted to and passed upon by the jury to such an extent that, even under appellant's contention, its rights in the premises were not prejudiced. There was before the jury evidence of millwrights that belt shifting devices could have been effectively maintained and operated at the place in question, and there was also the evidence of others that they could not. The issue was therefore squarely made in the evidence, although it was not raised by appellant's answer to the complaint, and was not within the pleadings. The court instructed the jury as follows:

"While the law commands the performance of the duty I have named, it does not require or compel the performance of an impossible or impracticable and useless thing. If you find from a fair preponderance of the evidence that proper belt shifters or other mechanical contrivances could have been provided and maintained without a substantial interference with the use and operation of the machinery, and that no such proper belt shifters were provided and maintained, and that the failure to so provide and maintain them was the proximate cause of the injury complained of, then you should find for the plaintiff, unless you further find from a fair preponderance of the evidence that plaintiff in any wise contributed to his own injury by carelessness, negligence or recklessness."

Under the evidence admitted, and under the above instruction, the appellant undoubtedly had the benefit of a finding by the jury upon the subject. The jury must have found, under

the evidence and under that instruction, that proper belt shifters could have been practicably provided and maintained.

We think the question of contributory negligence was, under the circumstances, properly submitted to the jury, and that it was submitted under proper instructions.

It is insisted that the verdict was excessive. It was in the sum of $6,000. Respondent's injury was in the bones of the ankle joint. He was long in the hospital under treatment. Pieces of bone were extracted at the joint, and a discharging sore continued up to the time of the trial. At the ankle joint where the bone was removed, a hole or depression exists, about one and one-half by two inches in dimension. He cannot move the foot. The joint is stiff, and the evidence shows that permanent anchylosis has resulted. Appellant cites *Bailey v. Cascade Timber Co.*, 35 Wash. 295, 77 Pac. 377, as authority for reducing this verdict. The verdict in that case was also for $6,000, and was, by direction of this court, reduced to $4,000. The injury there consisted of a fracture of the ulna of the forearm, and a dislocation of the head of the radius. The turning motion of the forearm was to some extent limited, and at the elbow the arm could not be bent to the full extent. The evidence showed that Bailey was still able to cut wood, and that his earning capacity was not greatly lessened. Moreover, the trial court in that case, in its order denying a motion for new trial, expressly stated that the amount of the verdict should not have been in excess of $4,000, but declined to require a remittance from the amount, in the belief that it lacked the power to do so. This court held that it had such power, and directed that it should require Bailey to remit $2,000 or submit to a new trial. The record discloses no such finding of the trial court in this case. The denial of the motion for new trial, which expressly raised the point, shows that, in the opinion of that court who saw and observed respondent's injury, the verdict was not excessive. We do not think the evidence is such that we would

be justified in interfering with the trial court's ruling in that regard.

The judgment is affirmed.

MOUNT, C. J., and DUNBAR, JJ., concur.

FULLERTON, J, concurs in the result.

RUDKIN, ROOT, and CROW, JJ., concur, in view of the decision in *Hall v. West & Slade Mill Company.*

[No. 5836. Decided December 26, 1905.]

THE STATE OF WASHINGTON, *Respondent,* v. HENRY STRODEMIER, *Appellant.*[1]

CRIMINAL LAW—JURORS—MISCONDUCT—NEW TRIAL. It is misconduct entitling the accused in a criminal case to a new trial, for a juror to separate from the body of the jury and go with a bailiff to a public drinking saloon and take a drink of intoxicating liquor, without the knowledge or consent of the judge (RUDKIN and FULLERTON, JJ., dissenting).

SAME—PRESUMPTION OF PREJUDICE. Where a juror is guilty of such misconduct, it cannot be shown that the same was without prejudice by the fact that he was the last juror to consent to the verdict, since prejudice will be conclusively presumed (RUDKIN and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered May 18, 1905, upon a trial and conviction of the crime of cattle stealing. Reversed.

W. J. Canton and *W. E. Southard,* for appellant, cited, Bal. Code, § 6947; *State v. Place,* 5 Wash. 773, 32 Pac. 736; *State v. McCormick,* 20 Wash. 94, 54 Pac. 764.

W. A. Reneau and *Sam B. Hill,* for respondent, upon the point that there was no misconduct on the part of the juror warranting a new trial, cited, *inter alia: State v. Burns,* 19 Wash. 52, 52 Pac. 316; *Edwards v. Territory,* 1 Wash. Ter.

[1]Reported in 83 Pac. 22.

195; *People v. Bemmerly,* 98 Cal. 299, 33 Pac. 263; *State v. Harris,* 12 Nev. 414; 17 Am. & Eng. Ency. Law (2d ed.), 1221; *State v. Wart,* 51 Iowa 587, 2 N. W. 405; *Crockett v. State,* 52 Wis. 211, 8 N. W. 603, 38 Am. Rep. 733; *State v. Fertig,* 70 Iowa 272, 30 N. W. 633; *State v. Griffin,* 71 Iowa 372, 32 N. W. 447; *State v. Kennedy,* 77 Iowa 208, 41 N. W. 609; *Epps v. State,* 102 Ind. 539, 1 N. E. 491; *Cooper v. State,* 120 Ind. 377, 22 N. E. 320; *Drew v. State,* 124 Ind. 9, 23 N. E. 1098; *State v. Bailey,* 32 Kan. 83, 3 Pac. 769; *Cook v. Territory,* 3 Wyo. 110, 4 Pac. 887; *People v. Lyle* (Cal.), 4 Pac. 977; Hughes, Crim. Law & Proc., § 3359; *Territory v. Hart,* 7 Mont. 489, 17 Pac. 718; *State v. Reed,* 3 Idaho 754, 35 Pac. 706; *People v. Leary,* 105 Cal. 486, 39 Pac. 24; *People v. Van Horn,* 119 Cal. 323, 51 Pac. 538; *State v. Corcoran,* 7 Idaho 220, 61 Pac. 1034; *State v. Livingston,* 64 Iowa 560, 21 N. W. 34.

MOUNT, C. J.—Appellant was convicted of the crime of cattle stealing. He alleges three errors of the trial court. One of these is decided adversely to his contention in *State v. Strodemier,* 40 Wash. 608, 82 Pac. 915. Another cannot arise upon a new trial. It is therefore necessary for us to consider but one of the alleged errors. At the beginning of the trial of the case, the jury was ordered kept together in charge of sworn bailiffs. While the jurors were not sitting in the jury box, they were kept at a hotel at the county seat. On the morning of January 5, 1905, before the court had convened for the day, and before the jury had breakfasted, one of the jurors, in company with one of the bailiffs, went to a public drinking saloon out of the hotel, without permission of the court or the consent of appellant, and there took a drink of whiskey, and immediately returned in charge of said bailiff to the other jurors at the hotel. One or two other persons beside the bar tender were in the saloon while the juror and the bailiff were there, but no conversation took place between said juror and other persons, except such con-

versation as was necessary to order drinks. Appellant maintains that this was such misconduct of the jury as to entitle him to a new trial. The question was presented to the trial court upon motion for a new trial, which was denied.

The court should have sustained the motion upon this ground. If the rule is established that a juror, in company with a bailiff, may separate from the body of the jury and go to a public drinking saloon, and there indulge in drinking intoxicating liquors, without the knowledge of the trial judge or the consent of the defendant, dire results may follow. If one juror may be permitted to do such acts, the whole jury may do so, and jurors disposed to such habits may readily bring jury trials into disrespect and contempt. Public policy forbids that such acts be tolerated in the trial of causes. The fact that the juror took a drink of intoxicating liquor during the trial is not so reprehensible of itself as the fact that he went to a public drinking saloon and, at such public place, in the presence of the bar tender and one or two others, drank liquor, and was permitted to go there by an officer whose sworn duty required that he should not give the juror drink except by order of the court.

It is the policy of the law, in keeping jurors together and away from the public, that nothing outside of the evidence shall be permitted to influence their verdict. When they are taken, either singly or in a body, to a public drinking saloon, where people who are interested may be expected to, and frequently do, congregate to discuss the case on trial, an opportunity is afforded for undue influence upon the jury, and the spirit, if not the letter, of the law is violated. Cases, no doubt, frequently arise where, from necessity, a juror is permitted to withdraw from the body of the jury for a short period of time, and without the express order of the court or the consent of the defendant on trial. Such acts, of course, arise from necessity, and would not be held to be misconduct. But such is not the case here. The only excuse offered is

that the juror was suffering from a cold and pain in the stomach. If these facts were true, no emergency is shown, and no excuse is offered for not applying to the court for an order for some remedy, which could readily have been granted without exposing the juror to the public in the unseemly manner which he took upon himself. Neither he nor the bailiff was justified in this conduct.

In order to avoid the misconduct of this juror, the state filed affidavits of several of the jurors to the effect that the juror was the last to consent to a verdict of guilty; and it is contended for that reason that the misconduct of the juror was without prejudice. But the rule seems to be that, where misconduct is admitted, jurors cannot be heard to deny its prejudicial influence. *People v. Chin Non,* 146 Cal. 561, 80 Pac. 681; *People v. Stokes,* 103 Cal. 193, 37 Pac. 207; *People v. Azoff,* 105 Cal. 632, 39 Pac. 59.

We think that, under the circumstances of this case, prejudice must be presumed. The judgment is therefore reversed, and the cause remanded for a new trial.

DUNBAR, HADLEY, CROW, and ROOT, JJ., concur.

RUDKIN, J. (dissenting)—There are but two conceivable reasons why the verdict should be set aside in this case: First, because one of the jurors was separated from his fellow jurors, for a few minutes, in company with a sworn officer of the court having him in charge; or second, because the same juror entered a public saloon and took a drink of whiskey during the progress of the trial. We cannot believe that the majority intends to lay down the rule that a verdict must be set aside every time a juror enters a public saloon or takes a drink of whiskey during the progress of a trial. Those who are familiar with the habits of twelve men picked up from the ordinary walks of life know full well the results that would follow from the adoption of any such rule.

Nor did the withdrawal of the juror from his associates under the facts disclosed in the record constitute a separa-

tion of the jury in legal contemplation. "The presumption will not be indulged in that a separated juror was tampered with in the immediate presence of the officer having him in charge." 12 Ency. Plead. & Prac. 572. Even where there is an improper and unauthorized separation of the jury, according to the great weight of authority, the only effect of the separation is to throw upon the state the burden of rebutting the inference that injury or prejudice may have resulted to the accused, by reason of the separation. Id., 568-570. It is unnecessary for us to consider what the proper rule should be in this jurisdiction, under such circumstances, but we refer to the majority rule for the purpose of showing that, in a case like this, where there has been no separation in fact, and where it is affirmatively and conclusively shown that no prejudice resulted, a new trial should not be granted. While the conduct of the bailiff and juror is properly subject to censure and criticism, the parties to the action were in no manner responsible for their shortcomings.

We think proper punishment meted out to the juror and the officer for their contumacious conduct in disobeying the orders of the court, would fully satisfy the demands of public justice, and that the new trial should be denied.

FULLERTON, J., concurs with RUDKIN, J.

[No. 5727. Decided December 26, 1905.]

LOUIS HOVELAND, *Respondent,* v. HALL BROS. MARINE RAILWAY AND SHIPBUILDING COMPANY, *Appellant.*[1]

MASTER AND SERVANT—NEGLIGENCE—FACTORY ACT—ASSUMPTION OF RISK. The defense of the assumption of risks from an unguarded shaft coupling cannot be raised where the defendant has violated the factory act requiring the coupling to be guarded.

SAME—PROXIMATE CAUSE OF INJURY—FINDING OF JURY. Where an employee slipped and stumbled while attempting to reach over an unguarded coupling on a revolving shaft, and the jury were instructed that the plaintiff could not recover if the accident would not have happened but for the condition of the ground, if known to the plaintiff, a finding for the plaintiff determines that the condition of the ground was not the proximate cause of the accident.

SAME—VIOLATION OF FACTORY ACT—QUESTION OF LAW. There is a violation of the factory act, as a matter of law, where couplings on a revolving shaft, about two and one-half feet above the ground, in a blacksmith shop, are wholly exposed and unguarded at a place where men are required to work.

SAME—APPEAL—REVIEW—HARMLESS ERROR. Where the failure to provide a guard for a coupling is, as a matter of law, a violation of the factory act, the defendant cannot complain of instructions submitting to a jury the question of the necessity of a guard.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 13, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee caught upon a coupling of a revolving shaft. Affirmed.

Hughes, McMicken, Dovell & Ramsey, for appellant.

E. H. Guie, for respondent.

HADLEY, J.—This is an action to recover damages on account of personal injuries. The plaintiff was in the employ of the defendant at the time of receiving his injuries. The defendant was engaged in operating and maintaining a ship-

[1]Reported in 82 Pac. 1090.

yard, and as part of its business, it operated a blacksmith shop and machine shop, in which were belts, pulleys, shafting and grindstones, which were run by machinery. In the blacksmith shop the defendant operated two grindstones for the purpose of sharpening tools. The grindstones were placed upon pieces of line shafting coupled together by iron couplings and bolts. This coupled shafting was run by means of a pulley on the end thereof, connected by belting with a main line shaft which was connected with, and operated by, an engine. The pieces of shafting were coupled together between the two grindstones, and the shafting was placed about two and one-half feet from the ground. Neither the shafting nor coupling, nor any part thereof, was covered or guarded. It is alleged that the ground was rough, uneven, and wet.

While in the discharge of his duties, the plaintiff was engaged in sharpening a large chisel on the grindstone situated nearest to the pulley on the end of the shafting. While so engaged, his feet slipped, and he stumbled and fell against the coupling on the shafting, when the same was revolving at a high rate of speed. His clothing was caught on the coupling and bolts where the shafting was coupled together, and he thereby sustained serious injuries. He alleges that defendant was negligent in that it failed to provide safeguards against said shafting and coupling, and that it permitted the ground under the shafting to be rough, uneven, and wet. The defendant, in its answer, admits that the shafting and coupling were not covered, guarded, or protected, but denies that such guard was necessary or proper. It also denies that the ground was rough, uneven, and wet. The answer also alleges that the plaintiff assumed the risk of the danger, and that his injuries were due to his contributory negligence. The cause was tried before a jury, and a verdict was returned for the plaintiff. Defendant moved for a new trial, which was denied, and from the judgment entered upon the verdict it has appealed.

Appellant contends that, notwithstanding the fact that it provided no safeguards for the shafting and coupling, the respondent nevertheless assumed the risk of the danger, which, it is claimed, was open and obvious. Chapter 37, Laws 1903, § 1, requires that the operators of machinery shall provide proper safeguards for shafting and couplings. Appellant neglected to comply with this plain statutory duty, and it cannot now be heard to urge that respondent assumed the risk consequent upon its own neglect to comply with the law. *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310; *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co., ante* p. 153, 83 Pac. 98. The first case cited had been decided before appellant's brief was written, but the other two have both been decided since that time. This court has therefore settled upon its adherence to the doctrine that the question of assumption of the risk cannot be raised where the injuries have proximately resulted from the violation of the statutory duty to properly guard machinery. There was admittedly a total absence of any effort on the part of appellant to guard this shafting and coupling. No question exists as to the sufficiency of a guard actually provided, as in the case of *Daffron v. Majestic Laundry Co., ante* p. 65, 82 Pac. 1089, where for that reason a different question arose. The instructions of the trial court in this case, upon the general subject of assumption of the risk, are in harmony with the views of this court upon that subject. Errors are assigned upon those instructions, but in view of what has already been decided, it is unnecessary that we shall further discuss the subject.

The evidence shows that the water for the grindstone was kept in a tin can on the other side of the shafting from respondent, and one wishing to let water on the grindstone had to reach over the revolving shafting and pull the plug out of the bottom of the can. While attempting to do this, respondent slipped and stumbled upon the coupling. Appellant contends that the proximate cause of the accident was

the condition of the ground upon which respondent slipped, and that he assumed the risk thereof. The court instructed the jury that, if they found the accident would not have happened but for the condition of the ground, and that respondent knew of that condition, then he could not recover. Under this instruction the jury must have found that the condition of the ground was not the proximate cause. The jury's finding settles that question. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

Appellant urges that, in each case, it is a question for the jury whether such safeguards as are proper have been provided, and further that proper safeguards are those which are necessary for the protection of those working about machinery under ordinary circumstances, and such circumstances as may reasonably be anticipated. It was evidently the purpose of the legislature to require that safeguards shall be provided for all shafting and coupling so situated that workmen in the ordinary discharge of their duties are liable to come into contact therewith. It is possible that conditions might be involved, with reference to certain situations, where it would be proper to submit to the jury, as a fact to be determined by them, whether a safeguard is reasonably necessary or practicable as applied to such conditions and situations. But, even if it be conceded that there may be such cases, it does not follow that this is such a case. Here was shafting with its coupling and coupling bolts exposed in an open space in appellant's blacksmith shop, placed about two and one-half feet from the ground, where it revolved with great speed, absolutely unguarded and unprotected in any way, and at the very spot where workmen were expected to be in the daily discharge of their duties. Such a situation and such conditions are so manifestly within the statute that they present purely a question of law as to appellant's duty with reference to providing a guard, and there can be no question of fact upon that subject for the jury.

The court, however, by its instructions, did submit to the

jury the question whether the shafting and coupling could have been advantageously guarded. Appellant complains of this instruction, but its complaint is made upon the theory that it was entitled to a broader instruction submitting the question of necessity for a safeguard and whether the situation was such as properly called for a guard. From what has already been said, it follows that the contention that the instruction was erroneously lacking in the above particular cannot be sustained under the admitted facts in this case. Again, when it is considered with reference to what it does contain, it is found to be favorable to appellant, and therefore not prejudicial to it.

The judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, RUDKIN, CROW, and FULLERTON, JJ., concur.

[No. 5808. Decided December 26, 1905.]

ROBERT Y. SLATER *et al.*, *Appellants*, v. JOHN GRIBBEL *et al.*, *Respondents*.[1]

EQUITY—CLAIM TO EQUITABLE INTEREST IN PURCHASE OF LAND—FRAUD OF PLAINTIFF—RELIEF IN EQUITY. No standing in a court of equity is shown by one who fraudulently misrepresents that he is the owner of coal lands, and after securing an option for $100 for the purchase of the property at $35,000, further fraudulently represents that he has entered into a contract for its purchase at $100,000, upon which $15,000 had been paid, and thereby and by agreeing to organize a corporation and float bonds to reimburse investors for advances, secures advances to the extent of $50,000 which he converts to his own use, and refuses to either purchase the property or pay the taxes; and the persons whom he has defrauded may, to protect themselves, purchase the property independently and for their exclusive benefit, even before the time for his option has expired.

Appeal from a judgment of the superior court for King county, Bell, J., entered January 7, 1905, in favor of the

[1] Reported in 83 Pac. 19.

defendants, after a hearing on the merits before the court without a jury, in an action to recover an interest in land; also, from an order of said court, Frater, J., entered January 28, 1905, denying an application to modify the judgment. Affirmed.

W. H. Bogle, for appellants.

William Parmerlee (William G. Crosby, of counsel), for respondents.

MOUNT, C. J.—Appellant Slater brought this action in equity, asking the court to adjudge him a four-tenths interest in certain lands, in King county. After issues were made upon the pleadings, and after a trial on the merits, the court, without making any findings of fact, entered a decree adjudging that appellant Slater was entitled to a four-tenths interest in the lands in question, on condition that within four months from the date of the decree he would repay to respondents the sum of $27,500 borrowed from them, and the further sum of $21,100, being four-tenths of the purchase price of the land paid by respondents, making a total of $48,600. From that decree Slater has appealed.

There is some dispute of the facts upon the record, but after carefully reading the same, we find the following to be the substance of the facts in the case: Prior to July, 1902, the heirs of John McIlenry, deceased, were the owners of about one thousand, one hundred and seventeen acres of land, in sections 26, 30, 32, and 36, in township 21, north, of ranges 6 and 7, in King county, which lands are supposed to contain deposits of coal. J. B. Metcalfe was attorney in fact for the heirs of John McIlenry, deceased. In May and June of 1902, appellant Slater, who is a resident of Washington, D. C., accompanied by respondent W. S. Bowen, went to the office of John Gribbel in Philadelphia, Pennsylvania, and there represented to Mr. Gribbel that they had an option to purchase the lands above mentioned; that they wanted to take up the option and acquire the title to said lands and

thereupon organize a corporation, to be known as the "Green River Coal Mining Company," with a capital stock of $5,000,000, and then bond the corporation for $300,000, which sum of money realized from the bonds was to be used in paying the purchase price of the land and equipping the corporation for mining coal in the state of Washington. They also represented that negotiations were under way for floating the said $300,000 worth of bonds, and that a trust company had promised to float the bonds as soon as title could be acquired to the land. They then proposed to Mr. Gribbel to borrow $5,000 from him, which money was to be used for the purpose of taking up the option on the land. Relying upon the representations as above stated, Mr. Gribbel advanced to Slater and Bowen $5,000, and took a contract by which they agreed to repay the said sum of $5,000 to Mr. Gribbel, as soon as money was realized upon the bonds above mentioned, and to issue to him one hundred thousand shares of fully paid stock in the corporation to be organized. They also obtained $5,000 from I. J. McGeogh of Philadelphia, and $10,000 from C. T. Bride of Washington, D. C., in the same way.

They then came to Seattle, whereupon appellant Slater employed one D. B. May to call upon J. B. Metcalfe for the purpose of purchasing the land above referred to. Mr. May did so, and on July 21, 1902, entered into a contract with Mr. Metcalfe by the terms of which contract Mr. Metcalfe, for the heirs of John McHenry, deceased, agreed to sell and convey said lands to said May for the sum of $35,000, Mr. May agreeing to assume and pay the back taxes which were then due and delinquent in a large amount. Slater furnished May $100, which was paid down on the contract. The balance was to be paid as soon as the title in fee, subject to the taxes, could be conveyed to Mr. May. Mr. May thereupon, on the same day, to wit, July 21, 1902, at Slater's request, entered into a contract with Slater, by which contract Slater agreed to pay to Mr. May the sum of $100,000 for the prop-

erty as follows: $15,000 cash at the date of the contract, $25,000 on September 1, 1902, and $60,000 within six months from the date of the contract. At the time this last named contract was entered into, a receipt for $15,000 was indorsed thereon by Mr. May, but no money was paid except the $100 which May paid to Mr. Metcalfe as above stated.

With this contract in their possession, Slater and Bowen returned to Pennsylvania, where they began to solicit funds which they stated were for the purpose of meeting the $25,000 payment due on September 1. They represented, that said D. B. May was the owner of the land; that Slater held a contract for the purchase thereof from May for $100,000; that $15,000 of this sum had been paid, and that the lands were valuable for deposits of coal contained therein; that they intended to form a corporation as hereinbefore stated, and that they had arranged with a New York trust company to float the bonds for $300,000 as soon as a good title was obtained to the lands. Upon the strength of these representations, they succeeded in borrowing about $36,000 from the respondents, in addition to the $20,000 hereinbefore referred to, issuing individual contracts promising to repay each person contributing money the amount he contributed as soon as the $300,000 in bonds were realized upon, and also promising to deliver to each person a stated number of shares of stock of the Green River Coal Company when the same should be incorporated. The whole of the money realized in this way was turned over to the appellant R. Y. Slater. No payments were made upon the contract between Slater and May, and no further payment was made upon the contract between May and Metcalfe.

In October, 1902, King county, in which the lands were located, instituted proceedings to foreclose its lien for taxes upon the lands. Thereupon Mr. Metcalfe demanded of Mr. May that he pay the taxes against the lands. Mr. May, in turn, demanded money of Slater for that purpose. Slater refused or neglected to advance any money for this purpose,

the attention of respondents was called to this foreclosure proceeding, and upon inquiry they first learned that May had no title to the lands, but held only a contract for the purchase thereof, and that he had paid only $100 thereon. They also learned that Slater had collected more than $50,000 in money for the purchase of the land, and had paid none of the purchase price. He refused to pay the purchase price, claiming he had paid $40,000 thereon, and refused to pay the taxes or to organize the corporation. Respondents, after learning of the fraud which had been perpetrated upon them, thereupon, in order to protect themselves against total loss of the money they had advanced to Slater, entered into negotiations with Mr. Metcalfe and Mr. May for the purchase of the lands, independently of Mr. Slater, which negotiations resulted, on January 5, 1905, in a deed from said May to the defendants—except May, McGeogh and Riegle—conveying the property to them in fee for the sum of $52,500. The appellants McGeogh and Riegle were advised of the purposes and objects of the other defendants in purchasing the property direct, and were invited to furnish their *pro rata* of the purchase price and share in the results, but they refused to do so. The evidence also shows that the whole sum of $56,400, collected by appellant Slater from the respondents, was converted by Slater to his own use, except the sum of six or seven thousand dollars, which was used in promoting his fraudulent scheme.

Appellant Slater, upon this appeal, argues that he is an equitable owner of the lands, because (1) the title of respondents was acquired from Mr. May, with whom he had a contract for the purchase thereof, which contract was known to respondents, and also because he had paid $40,000 thereon; (2) because he had not abandoned the contract; and (3) because respondents took title direct from May before the last payment upon Slater's contract became due, and were therefore estopped by their own deeds from contending that

their title is free from the equity of Slater, under the rule in *Brummett v. Campbell,* 32 Wash. 358, 73 Pac. 403.

It is sufficient answer to all these positions to say that Slater's fraud, which is clearly shown upon the record, gives him no standing in a court of equity. His acts from the beginning clearly show his fraudulent intention. He represented to respondent Gribbel in June, 1902, that he had an option on the land. This representation was absolutely false. He had no option of any kind at that time. He probably knew that he could acquire a title at that time, but he had none then. On July 21, 1902, he could have purchased the property for $35,000. He did not do so. Instead of that, he employed D. B. May, who knew nothing of the property and who had no money, to go to Mr. J. B. Metcalfe and purchase the property. May entered into a contract with Metcalfe for the purchase of the property for $35,000, paid $100 down with money furnished by appellant Slater, and then, at appellant's request, entered into a contract with appellant to sell the property to him for $100,000. This was a fraud upon the face of it. The contract recited that $15,000 was paid thereon. This was false. With this contract as a basis, appellant collected $36,000 more money from respondents, upon false and fraudulent representations. He made no payments upon the contract, except the sum of $100. He received and converted to his own use more than $50,000 by these fraudulent representations, and now, when the fraud is discovered by the persons defrauded, and they turn away from him and seek to protect themselves by purchasing the land for about one-half the sum he had agreed to pay for it, he asks a court of equity to adjudge him a four-tenths owner by reason of an alleged $40,000 payment which he never made, and to make which respondents furnished $40,000. But for the timely interference of respondents, the whole property would have been lost to them through foreclosure of delinquent taxes, and their only recourse would have been against Slater personally.

Under these conditions, the lower court certainly went as far as it was justified in going when it decreed that Slater should have a four-tenths interest in the land upon repayment of the money loaned to him and the payment of $21,100 additional, to the respondents, being four-tenths of the purchase price which respondents finally paid for the lands. Respondents have not appealed, and for that reason only we shall not modify the decree in their behalf. Appellants McGeogh and Riegle were invited to contribute to the purchase of the land by respondents, and share in the results, before the purchase was actually made. They declined, and outside parties were subsequently permitted to come in and assume the burden. They are therefore in no position to complain.

The judgment appealed from is affirmed, with costs against appellant Slater.

DUNBAR, ROOT, RUDKIN, FULLERTON, HADLEY and CROW, JJ., concur.

[No. 5829. Decided December 27, 1905.]

In the Matter of the Petition of HUGH J. O'NEILL *for a Writ of Habeas Corpus.*[1]

STATUTES—TITLE OF ACT—SUFFICIENCY. An act entitled, "An act to prevent fraud upon travelers and prescribing where, how, and by whom railroad tickets shall be sold," etc., is sufficient to embrace provisions prohibiting the business of ticket brokerage except by authorized railroad agents.

CONSTITUTIONAL LAW—POLICE POWER—PROHIBITING SALE OF RAILROAD TICKETS—LICENSED AGENTS—STATUTORY REGULATION. Laws 1905, p. 376, providing that none but a duly authorized agent of a railroad company shall be permitted to sell railway transportation, does not deprive a citizen, who was already established in such business prior to the enactment of the law, of property without due process of law, or unduly interfere with his liberty to pursue his occupation; since it is a valid exercise of the police power to make reasonable regulations to protect the traveling public and prevent the perpetration of frauds in the sale of railway tickets.

[1]Reported in 83 Pac. 104.

SAME—EQUAL PROTECTION OF LAWS—SPECIAL PRIVILEGES. Laws 1905, p. 376, prohibiting the business of railroad ticket brokerage, and requiring railroad companies to duly commission all agents authorized to sell tickets and to redeem unused tickets, does not deny the equal protection of the laws, since it rather imposes duties upon, than grants special privileges to, the railroad companies.

SAME—DELEGATION OF LEGISLATIVE POWER. An act making it a misdemeanor for any one except authorized agents of a railroad company to sell railroad tickets, and requiring companies to commission their agents, is not unconstitutional as delegating to the companies the power to say who are guilty of the offense by issuing or withholding the authority.

SAME—STATUTES—PARTIAL UNCONSTITUTIONALITY. The unconstitutionality of part of an act imposing the burden of proof upon the accused would not affect the balance of the act declaring the selling of railway tickets by unauthorized agents to be a misdemeanor.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 24, 1905, upon overruling a demurrer to the return to a writ of habeas corpus, remanding to custody a prisoner charged with the offense of selling railway tickets without a license. Affirmed.

Richard Saxe Jones and *William H. Brinker (Graves & Graves,* of counsel), for appellant. The appellant's business was "property" within the protection of the constitution. *Ex parte Garland,* 4 Wall. 333, 18 L. Ed. 366; *Cummings v. Missouri,* 4 Wall. 277, 18 L. Ed. 356; *Davis v. Gray,* 16 Wall. 203, 21 L. Ed. 447; *Phyfe v. Wardell,* 5 Paige 268; *Armour v. Alexander,* 10 Paige 571; *Boon v. Moss,* 70 N. Y. 465; *Metropolitan Nat. Bank v. St. Louis Disptach Co.,* 36 Fed. 722; *Dwight v. Hamilton,* 113 Mass. 175; *Grow v. Seligman,* 47 Mich. 607, 11 N. W. 404, 41 Am. Rep. 737; *Smith v. McCullough,* 104 U. S. 25, 26 L. Ed. 637; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565; *Scott v. McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896; *In re Aubrey,* 36 Wash. 308, 78 Pac. 900. The power to take property is a judicial, not a legislative function. Constitution, art. 1, § 16; Tiedeman, Lim. Police Power, 277. The act unduly restricts the liberty to pursue his trade or business. *Allgeyer*

v. Louisiana, 165 U. S. 578, 41 L. Ed. 832; *State v. Brown,* 37 Wash. 97, 79 Pac. 635; *People ex rel. Tyroler v. Warden,* 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. 763, 43 L. R. A. 264; *Butchers Union etc. Co. v. Crescent City Live-Stock etc. Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585. The act takes the business of the appellant from him and hands it over to the railway corporations without one dollar of compensation. *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. The act complained of denies to the petitioner the equal protection of the laws. *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. The act delegates to the railroads the power to make an act criminal. *Stoutenburgh v. Hennick,* 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; *United States v. Blasingame,* 116 Fed. 654; *Field v. Clark,* 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Harmon v. State,* 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618; *Schaezlein v. Cabaniss,* 135 Cal. 466, 67 Pac. 755, 87 Am. St. 122, 56 L. R. A. 733; *Anderson v. Manchester Fire etc. Co.,* 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 50 Am. St. 400, 28 L. R. A. 609; *Dowling v. Lancashire Ins. Co.,* 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *O'Neil v. American Fire Ins. Co.,* 166 Pa. St. 72, 30 Atl. 943, 45 Am. St. 650, 26 L. R. A. 715. Every doubt should be resolved in favor of the liberty of the citizen. *In re Farrar,* 133 Fed. 254; *The Enterprise,* Fed. Cas., No. 4499; Bishop, Written Laws, § 194.

Kenneth Mackintosh, James F. McElroy, Arthur C. Spencer, and *Dan J. Malarkey,* for respondent, to the point that anti-scalping laws are constitutional, cited: *Fry v. State,* 63 Ind. 552, 30 Am. Rep. 238; *Burdick v. People,* 149 Ill. 600, 36 N. E. 948, 41 Am. St. 329, 24 L. R. A. 152; *State v. Corbett,* 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *State v. Bernheim,* 19 Mont. 512, 49 Pac. 441; *State v. Clark,* 109 N. C. 739, 14 S. E. 84; *Commonwealth v. Keary,* 198 Pa. St. 500, 48 Atl. 472; *Jannin v. State,* 42 Tex. Cr.

631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. 821; *State ex rel. Tyroler v. Warden*, 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. 763, 43 L. R. A. 264.

HADLEY, J.—This appeal is from an order denying release upon a writ of *habeas corpus*. The writ was issued by this court upon application therefor, and was made returnable before the Honorable Mitchell Gilliam, one of the judges of the superior court of King county. From the denial of release by that court, this appeal is prosecuted. The appellant was arrested by the sheriff of King county, by authority of a warrant issued by John B. Gordon, a justice of the peace in said county. The warrant was issued in pursuance of a complaint filed with said justice, charging appellant with selling, issuing, and dealing in, railroad passenger transportation, and with setting up, establishing, maintaining, and conducting within this state an office and place of business for the sale, exchange, and transfer of the whole or any part of railroad tickets and other evidences of a right to travel upon railroads, within or without the limits of this state, without keeping a certificate setting forth his authority to sell, issue, or deliver railroad transportation. The acts charged constitute a misdemeanor in this state, under the terms of chapter 180, Laws 1905, p. 376. The sole contention of appellant is that said act is unconstitutional and void.

The first contention is that the title of the act is insufficient. It is suggested that the real object of the act is to prohibit the business of ticket brokerage, and that the title does not comprehend that subject. The title is as follows:

"An act to prevent fraud upon travelers and prescribing where, how, and by whom railroad tickets shall be sold, and providing the terms upon which the redemption of the whole or any part of such tickets as may not have been used shall be made, and prescribing penalties for the violation of this act."

It will be seen that the title specifically states that the act

prescribes "where, how, and by whom railroad tickets shall be sold." It must be apparent to any one reading the title that the act discloses what persons shall not sell such tickets. The act is therefore not void on account of its title.

Appellant next contends that the act is void in that it deprives him of his business and property without due process of law, and interferes with his liberty as a citizen in the pursuit of his business. The substance of the act is that no one but a duly authorized agent of a railroad company shall be permitted to sell railway transportation, and he shall be provided with a certificate from the company showing his authority. Such agent must have a fixed place of business, and must keep the certificate of his authority posted in a conspicuous place in such place of business. It is made unlawful for any one who is not possessed of such certificate, and who has not posted it as aforesaid, to sell or offer for sale railroad tickets or other evidence of a right to travel upon any railroad, whether the same be situated or owned or operated within or without the limits of this state. It is also made unlawful for one to set up, establish, maintain, conduct, or operate within this state any office or place of business for the sale, exchange, or transfer of evidences of a right to travel upon any railroad unless he possesses such certificate of authority and has posted it as aforesaid. It is also provided that any railroad company doing business in this state shall redeem, upon presentation to any of its ticket agents, the whole or any part of an unused ticket which has been issued by such company.

Appellant argues that the act violates § 3, art. 1, of the state constitution, and art. 5, and § 1, art. 14, amendments to the constitution of the United States. He states that for many years he has been a resident of Seattle, and that during that time he has pursued the occupation of a broker and dealer in railway and other tickets for transportation of passengers over various transportation lines in the state of Washington; that he bought from all persons desiring to sell, and sold to

all persons desiring to buy, such tickets, and that in such way he had established a permanent and lucrative business. He insists that such business was property of which he may not be deprived within the constitutional provisions cited which prohibit the taking of property without due process of law. If the business of buying and selling tickets evidencing the right to railway transportation is not a subject within the regulative powers of the state, then perhaps appellant's business in dealing in such tickets has become property in his hands which cannot be taken away.

Railway corporations exist by authority of the state, and are required to serve the public. One of the purposes of this act, as specified in its title, is "to prevent fraud upon travelers." It is true there is no charge of actual fraud made against appellant, but the declared purpose of the statute is to prevent the possibility of fraud, and the method of regulation to prevent it has been violated by appellant. If it is within the power of the state to establish general rules designed to prevent fraud in the premises, appellant cannot be heard to say that the violation of those rules does not result in fraud. We are unable to see why the state, which creates the corporation and requires that it shall serve the public, has not the power to adopt reasonable regulative means applicable to that service, whereby no fraudulent imposition may be visited upon the public. If, within the opinion of the legislature as it is supposedly advised from experience of citizens of the state, the sale of railway tickets by others than the railway companies and their duly authorized agents results in fraudulent imposition upon travelers, then it would seem to be within the regulative police power of the state to adopt means to prevent it.

The thing to be sold, viz., the right of transportation over the railway line, originally belongs to the company and is its property. The company is under obligation to sell that property to all who apply for it, and who tender the necessary price. The state, by the act in question, has said that

the original holder of that property and its duly authorized agents shall alone be permitted to sell it. Appellant's position is that he has the right to traffic in the property after the railway company has sold it, and that to deprive him of that privilege is to violate a constitutional right. The mere right to continue in the future to buy and sell property of the class of railway transportation, which is primarily owned by the railroad company to be sold to the individual traveler for transportation and not for the purpose of subsequent traffic therein for speculation and gain, we think cannot be such an individual property right as comes within the constitutional provisions, when considered as against the regulative power of the state concerning such transportation, and in the interest of protecting the property rights therein of the great number of people who become the owners of such property. Such traffic bears an important relation to the welfare of the general traveling public who are patrons of the railway companies, quasi-public corporations created to serve the public.

However, we do not approach this subject as a new question in the courts, and we need not discuss it as such. That the subject-matter of this statute is a proper subject for police regulation has been repeatedly held. We are aware that it is difficult to define the scope of the term "police regulation." It has been the subject of much discussion by the courts, and its application has sometimes been sarcastically criticised as the use of an indefinable something to sustain legislation unsupportable upon any other ground. However, it is the term which is used to define a power which resides in the state, and it has been expressly held that legislation of the character of that now before us, and upon the same subject, comes within its scope. *Fry v. State,* 63 Ind. 552, 30 Am. Rep. 238; *Burdick v. People,* 149 Ill. 600, 36 N. E. 948, 41 Am. St. 329, 24 L. R. A. 152; *State v. Corbett,* 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *State v. Bernheim,* 19 Mont. 512, 49 Pac. 441; *Jannin v. State,* 42

Tex. Crim. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. 821. While not expressly discussed, yet the police power in the premises was necessarily recognized in, *State v. Ray,* 109 N. C. 736, 14 S. E. 83, 14 L. R. A. 529; *Commonwealth v. Keary,* 198 Pa. St. 500, 48 Atl. 472. It was also expressly stated in some of the decisions that such legislation does not deprive one of his property without due process of law. While that subject was not particularly discussed in the opinions of all the cases cited, yet such was the necessary effect of the decisions. In *Ex parte Lorenzen,* 128 Cal. 431, 61 Pac. 68, 79 Am. St. 47, 50 L. R. A. 55, the same was in effect held with relation to an ordinance of San Francisco, requiring that street car transfer tickets should be issued and delivered within the car from which the transfer is made, and received only within the car to which it is made; and forbidding any person except the conductor or agent of the street car line to give, sell, or issue any transfer check.

Appellant argues that *Burdick v. People, supra,* should be distinguished from the case at bar, for the reason, as he alleges, that the Illinois act provided that a purchaser of a *bona fide* ticket with the intention of traveling upon the same might sell any part of it to another person, and it is therefore contended that the act was limited to the prevention of forgery and the fraudulent sale of tickets. The provision was that one who had so purchased a ticket "from any agent authorized by this act" might so transfer it, and clearly had reference to a mere individual traveler. The effect of the statute, so far is it related to such as appellant, who did not buy from an "agent authorized," but who bought miscellaneously in the open market and transferred again, was the same as our own. Moreover, our statute provides that the individual ticket holder is entitled to have the whole or any part of an unused ticket redeemed by the company that issues it, and the same end, in effect, is therefore accomplished for him as was provided by the Illinois statute. Our attention has been called to the fact that an effort was made before

the supreme court of Illinois to have the opinion and judgment in the *Burdick* case annulled, on the alleged ground that the opinion was obtained by collusion and fraud practiced on the court, and it is contended that the decision for that reason should not be regarded as a precedent. The court, however, declined to interfere with the opinion and judgment. *In re Burdick,* 162 Ill. 48, 44 N. E. 413. The majority opinion states: "No contention is made that the statute which was considered in the *Burdick* cases is unconstitutional, or that this court in the opinions filed by it did not correctly hold the law." So far as we are advised, the original opinion therefore stands to this day as the decision of the court of last resort upon this subject in that state.

Appellant's chief reliance is upon the authority of *People ex rel. Tyroler v. Warden of City Prison,* 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. 763, 43 L. R. A. 264. The majority opinion in that case was written by Chief Justice Parker, and held a statute of similar import to our own to be unconstitutional as taking property without due process of law, and as interfering with the liberty of the citizen. There were three dissenting judges, and two somewhat extended dissenting opinions were written. Some of the opinions in cases we have cited above have referred to that case, and have followed the reasoning and conclusions of the dissenting judges rather than the argument of Judge Parker. It was also argued in some instances that the decision of the majority of the New York court was based upon a statute having a distinguishing feature. In Judge Parker's opinion he emphasized the fact that the statute did not limit the right to sell tickets to the particular transportation company over whose line the traveler desired to be conveyed, and he construed the statute to mean that, when one became the agent of the transportation company, he was thereby authorized to buy tickets of any other transportation company in the world, and to sell them to any person who might apply for

them. The statute had been previously construed otherwise by the supreme court of New York in the same case.

Some of the cases criticizing the New York case distinguished it on the above ground, inasmuch as the statutes with which they dealt limited the authority of the agent in the premises to the sale of tickets of the one transportation company. Such is also true of our statute, as will be seen by reference to § 1. The authority of the agent of the railroad company mentioned is "to sell its tickets," and is not extended to those of other companies. Since this case was argued, however, our attention has been called to the fact that the supreme court of New York has, since the *Tyroler* case, had under consideration a modified statute which eliminated the feature above mentioned, but that the court nevertheless felt impelled, on the authority of the *Tyroler* case, to hold the statute unconstitutional. *People ex rel. Fleischman v. Caldwell,* 64 App. Div. 46, 71 N. Y. Supp. 654. The last named decision was by the court of appeals affirmed by a mere memorandum decision based on the *Tyroler* case. *People ex rel. Fleischman v. Caldwell,* 168 N. Y. 671, 61 N. E. 1132. All the judges seem to have concurred except one who did not vote. It appears, therefore, that, as the matter now stands, there is practical accord of decision in the state of New York in favor of appellant's view.

Appellant argues that this court has recognized the authority of the *Tyroler* case in *State v. Brown,* 37 Wash. 97, 79 Pac. 635. That case involved a statute requiring one to submit to an examination and secure a license from the state dental board in order to "own, run, or manage" a dental office. It was held that, in so far as the statutory condition of ownership of a dental office was concerned, it was unconstitutional. In the opinion the court, in discussing general principles, cited and quoted from the opinion of Judge Parker in the *Tyroler* case. The language was cited as an illustration of a principle, but it cannot be said that this court then considered the force of the decision itself as applying to its

own subject-matter, when regarded in connection with the argument and weight of authority from other courts of last resort on the same subject-matter. Undoubtedly the weight of decision in reference to this particular class of statutes is against the holding of the New York court, and apparently that court stands practically alone.

Appellant also cites *In re Aubrey,* 36 Wash. 308, 78 Pac. 900, 104 Am. St. 952, as well as *State v. Brown, supra,* as sustaining the general principle for which he contends. The first case related to a statute which required a horseshoer to submit to an examination and pay a license fee as a condition precedent to the prosecution of his business. It was held to be an unconstitutional interference with his liberty to pursue such a business as horseshoeing. *State v. Brown,* as we have seen, dealt with a statute containing similar provisions with reference to the mere ownership of a dental office. Those are mere private occupations, and are unlike that of the common carrier whose business and duty it is to serve the public generally, and is therefore a proper subject for governmental control. Every one has the natural and constitutional right to pursue a lawful business, but we do not think he has such right to traffic in the transportation of a railway company without its permission or authority, as against the power of the state to regulate the sale of such transportation in the interest of the general public. A legislative act should be upheld unless there are clear constitutional reasons for holding otherwise. We are not convinced that such reasons exist in this case, and we are disposed to adopt the views of what we are constrained to believe is the weight of authority, having reference to decisions upon statutes treating of the same subject-matter in sister states. The arguments of the other courts may not be as elaborate as that of Judge Parker. His distinguished personality as a jurist and otherwise should cause his opinion and argument to receive much consideration, but his conclusions are not supported by the decisions of the other courts.

It is further argued that the act is objectionable in that it denies to the appellant the equal protection of the laws. It is claimed that it grants special privileges to railroad companies which are not enjoyed by other citizens. Cases we have cited hold that such a law does not grant special privileges, but that it rather imposes a burden upon railway companies, in that it limits the authority to sell tickets to the agent of the carrier appointing him, requires that the railroad company shall provide him with a certificate of authority, that no others shall sell transportation, and compels the company to redeem unused tickets. In view of all the requirements placed upon the railroad companies, we do not think it should be said that the act confers special privileges within constitutional prohibition. It, in effect, says to railroad companies, You must duly commission all persons who sell your transportation; no others shall purchase it, and you shall redeem all unused transportation.

It is also urged that the act delegates to railroad companies the power to create crimes, and to say who are criminals. It is argued that the companies may issue or withhold the certificates of authority at their own will, and that by withholding the certificate they are thereby empowered to make one a criminal who sells transportation without it. We do not think there is force in this argument. The statute simply says to the companies, You must appoint your own agents and certify as to their authority. This, as we have seen, is a reasonable regulation, and intended for the interest of the traveling public. It is true that the power to appoint the agents is in the railway company; but, for reasons already stated, the legislature has the undoubted power to say it shall be a misdemeanor for all others to engage in the sale of transportation. The railway companies must have agents to sell their transportation, and they cannot in reason be expected to appoint all who may apply. The mere fact that they may not appoint all applicants does not make any of the latter guilty of crime. If they become guilty, it is be-

cause, of their own volition, they persist in engaging in an act which the legislature says shall constitute a crime.

It is simply suggested by appellant that § 5 of the act provides that proof of certain facts shall be sufficient to establish a prima facie case. That involves a question that will arise upon the introduction of evidence at the trial upon the charge under which appellant is held. The matter now before us was determined upon demurrer to the return made by the officer to the writ of *habeas corpus*. What effect that portion of the statute may have upon the burden of proof is not now before us. Even if it should be held that that portion of the act changes the ordinary rule as to burden of proof and presumption of innocence, still it would not make the whole invalid. It purports to deal only with matters of evidence, and those are determinable at the trial.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5782. Decided December 27, 1905.]

ANNA M. HALL, *Respondent*, v. ESTELLA B. HALL *et al.*, *Appellants*.[1]

COURTS—FEDERAL QUESTION—RULE OF DECISION. The rights of husband and wife under the state laws to lands acquired from the United States before final proof, raises a Federal question upon which the decisions of the United States courts control.

PUBLIC LANDS—HOMESTEAD—HUSBAND AND WIFE—DIVORCE—COMMUNITY PROPERTY. A divorced wife acquires no interest in a homestead, patent for which is subsequently issued to the husband, where at the time of the divorce the husband had only the right of occupancy and a preference right to make entry upon the extension of the public surveys; since the Federal law controls as to the title obtained by a patent and the community property laws of the state are not recognized.

1 Reported in 83 Pac. 108.

Appeal from a judgment of the superior court for Stevens county, Richardson, J., entered November 22, 1904, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a widow to recover an interest in lands patented to her divorced husband. Reversed.

Binkley, Taylor & McLaren and *Voorhees & Voorhees (Charles Francis Voorhees,* of counsel), for appellants.

J. C. Marshall and *S. & J. W. Douglas,* for respondent.

RUDKIN, J.—Prior to the year 1898 the lands in controversy in this case were unsurveyed public lands of the United States. In the month of June of that year, the surveyor's plat was filed in the district land office, and on the 30th day of August, 1898, the lands were thrown open for settlement. On the latter date John F. Hall, now deceased, entered said lands under the homestead laws of the United States, and made final proof on the 8th day of August, 1899, after completing his five years' residence thereon, as required by said homestead laws. Patent issued on the 9th day of February, 1900. At all times between the 24th day of March, 1889, and the 4th day of March, 1896, said John F. Hall and the plaintiff Anna M. Hall were husband and wife. On the latter date the plaintiff was granted a divorce from said John F. Hall, in the superior court of Spokane county, but no disposition was made of the property rights of the parties in the divorce proceeding. On the 30th day of August, 1899, the said John F. Hall and the defendant, Estella B. Hall, intermarried, and continued to live together as husband and wife until the death of the former, on the 5th day of February, 1903. On the 10th day of January, 1903, said John F. Hall conveyed all his interest in said property by deed to the defendant Estella B. Hall. In view of the conclusion we have reached on the merits, it becomes unnecessary to refer to the claims of the other defendants.

The plaintiff brought this action, and asked that she be declared the owner of an undivided one-half interest in the property so acquired. The theory of the plaintiff's case was that said property was the community property of herself and her former husband, John F. Hall, and that by the decree of divorce they became tenants in common thereof. The plaintiff had judgment below, according to the prayer of her complaint, and the defendants appeal.

The only interest the decedent had in the property in controversy, at the time of the divorce, was the right of occupancy, coupled with a preference right to enter the land and acquire title thereto after the same was surveyed and thrown open for settlement. Before he could acquire such title, the land must be surveyed and thrown open to settlement, he must continue his residence until that time, and thereafter comply with the requirements of the homestead laws. How far state laws regulating the property rights of husband and wife attach to land acquired from the United States before patent, or at least before final proof, gives rise to an important Federal question which can only be authoritatively settled by the supreme court of the United States. In the recent case of *McCune v. Essig,* not yet reported,[1] that court held that the patent which issues to the widow upon the death of the homestead entryman carries with it the full legal and equitable title, to the exclusion of the entryman's children; in other words, that the Federal law controls. True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances.

The manifest object of our community property system is to place husband and wife on an equal footing as to their

[1]See, 199 U. S. 382, 26 Sup. Ct. 78. REP.

property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other. Furthermore, it is a well-known fact that our community system is utterly ignored in the administration of the Federal land laws. The wife is not made a party to a contest against an entry, and the husband is permitted to relinquish without the wife joining him. In *Ahern v. Ahern,* 31 Wash. 334, 71 Pac. 1023, this court held that, where the wife of the entryman died after the homestead law had been fully complied with, but before final proof, her children were entitled to a one-half interest in the homestead claim, as community property. In *James v. James,* 35 Wash. 655, 77 Pac. 1082, it was intimated that the community rights of the wife attached at even an earlier date. We are not called upon to retrace our steps at this time, but we are satisfied that we can advance no further without coming in conflict with the paramount laws of the United States and the decisions of the Federal supreme court. Under no proper construction of the laws of the United States and of this state, can the respondent be held to have any interest in the property in controversy, under the facts disclosed in the record before us.

The judgment is therefore reversed, with directions to dismiss the action.

MOUNT, C. J., HADLEY, FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5772. Decided December 27, 1905.]

R. CUNNINGHAM *et al., Respondents,* v. HARRY KRUTZ *et al., Appellants.*[1]

COURTS—FEDERAL QUESTION—RULE OF DECISION. As to what title passes by a patent to a surviving husband and wife under the homestead laws, the decisions of the United States courts are conclusive upon the state courts.

PUBLIC LANDS—HOMESTEAD—HUSBAND AND WIFE—TITLE OF SURVIVOR. A patent issued under the homestead laws to the surviving husband conveys the whole title to the husband, to the exclusion of the heirs of the wife, under U. S. Rev. Stat., §§ 2291, 2292; since the community property laws of the state cannot control the Federal provisions as to such title, and do not apply.

Appeal from a judgment of the superior court for King county, Bell, J., entered January 6, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action for partition. Reversed.

George Fowler, for appellants.

H. E. Foster, for respondents.

HADLEY, J.—This is an action for the partition of real estate. The plaintiffs allege that they are seized in fee simple of the undivided half interest in the land, and that the defendants Harry Krutz and Mary E. Foster are tenants in common with plaintiffs in the ownership of the land. The defendants Harry Krutz and wife, by their answer, deny that the plaintiffs have any interest whatever in the land, either as tenants in common with the defendants or otherwise. They also deny that the defendant Mary E. Foster has any interest in the land except that she holds a mortgage thereon for $500. It is affirmatively alleged in the answer that, in December, 1887, one Carlson made entry upon a certain quarter section of land, which includes the land in

[1]Reported in 83 Pac. 109.

question, the entry being made under the homestead laws of the United States; that he continued to reside thereon until April, 1890, when he commuted the homestead entry, made final proof, paid cash for the land at the government price, received his final receipt therefor, and that, in due course thereafter, a patent was issued to him by the United States; that in July, 1890, said Carlson borrowed of one Thomas S. Krutz the sum of $750, gave his note therefor, and to secure the same, executed a mortgage upon said land, which was duly recorded. Allegations are made showing the due foreclosure of the mortgage by the assignee thereof against that part of the land here involved, a conveyance of the land under the foreclosure by the sheriff, and subsequent conveyances in direct line to the defendant Harry Krutz; that the defendant Hattie Krutz was, at the date of the conveyance to Harry Krutz, and still is, the wife of Harry Krutz, and that said land became, by said conveyance, the community property of the said two defendants. They ask that plaintiffs' complaint shall be dismissed. The answer of Mary E. Foster denies that the plaintiffs have any interest in the lands, and asks that their complaint be dismissed.

The reply avers, that the entry was made about December 21, 1887, and that from that time Carlson and wife were in possession of, and resided upon, the land; that in 1890 the wife of Carlson died testate, leaving a last will, which was duly admitted to probate; that said wife left three children as devisees under her will; that one of the children, an infant, has since died intestate, and without issue; that on the death of the wife and the probating of her will, the said children, her devisees, became the sole owners in fee simple of an undivided half interest in said land, and continued to hold the same until March, 1904, when, by deed, the two surviving children, together with their father, the surviving husband, conveyed said undivided half interest to one Shea; that thereafter said Shea and his wife conveyed to the plaintiffs. The cause was tried by the court, and resulted in a

judgment for the plaintiffs, declaring that they are the owners in fee simple of an undivided half interest in the land, and awarding partition thereof. The defendants have appealed.

From the foregoing it will be seen upon what the respective claims of title are based. The respondents contend that the deceased Mrs. Carlson had a devisable community interest in the land, and that they are the owners, by successive conveyances, of the interest so devised. Upon the other hand, appellants urge that when the patent issued to the surviving husband, it conveyed to him the entire title as his separate property, and that through the foreclosure of a mortgage given by the patentee, and successive conveyances thereunder, the appellants Krutz and wife are the holders of the entire title.

The trial court refused to receive and consider the offered evidence of appellants as to the giving and foreclosure of the mortgage, and as to the subsequent conveyances by which Krutz and wife claim title. It was the theory of the court that the land was the community property of Carlson and his deceased wife, and that, by the will of the latter, the undivided half passed to her children, through whom and their grantees it has come to respondents. Upon this theory the court treated appellants' offered evidence as immaterial and incompetent. Respondents, however, concede in their brief that, if the patent conveyed separate and not community property, they have no interest in the land.

The entry was made as a homestead entry, and within less than three years thereafter the wife died. The husband did not continue to reside upon the land the required time to perfect the homestead, but commuted his homestead rights after the death of his wife, and made final proof and cash payment in pursuance of which, in due course, a patent was issued to him. It therefore becomes necessary to determine whether the land was the separate property of Carlson or whether it became the property of the community, and it is proper that we shall first refer to our own decisions bearing

upon the question as to who obtains title from the United States through a homestead patent.

In *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, Kromer made a homestead entry and an Indian woman lived with him as his wife. The required time of residence expired and final proof was made. After the making of final proof, a marriage ceremony was performed between Kromer and the woman, and soon afterwards a patent was issued to Kromer. It was held that the land became the community property of the two. The holding was, however, apparently based upon the theory that the fact that the two had been living together as man and wife, and that a marriage ceremony was subsequently performed, was not conclusive evidence that there was no previous marriage between them, and that the land therefore became community property, notwithstanding that final proof was made before the ceremony was performed.

In *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043, it was held that, where the required time of residence upon a homestead had expired, and the wife afterwards died but before final proof and issuance of patent to the husband, the community acquired only an equitable estate, the husband taking the full legal title and, upon his conveyance to a grantee ignorant of the equities of the wife's heirs, both the legal and equitable titles passed.

In *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811, it was held that, where a woman had settled upon and improved a homestead before her marriage, and final proof was made and patent issued to her after marriage, the land became her separate property, under our statute which defines as separate property of the wife all her property and pecuniary rights held by her at the time of her marriage. At the time of her marriage she had resided upon the land about four years, and although she was not then entitled to the legal title, the court seems to have considered that, on account of

her previous settlement and improvements, such equities attached as entitled her to the ultimate title as her separate property, the further fact appearing in that case that, as between the husband and wife, the land was deemed to be the wife's separate property.

In *Ahern v. Ahern,* 31 Wash. 334, 71 Pac. 1023, 96 Am. St. 912, the husband and wife had resided upon the homestead more than six years, when the wife died. Final proof was made after her death, and the patent was issued to the husband. It was held that the land became community property. In *Towner v. Rodegeb,* 33 Wash. 153, 74 Pac. 50, 99 Am. St. 936, it was held that, where a settler upon unsurveyed public lands died, leaving no widow and without heirs who were citizens of the United States, the land was again open to settlement, since the heirs could not succeed by right of inheritance, but by virtue only of a preference right given them by the laws of the United States, if they had been duly qualified citizens. In *James v. James,* 35 Wash. 655, 77 Pac. 1082, the homesteader and his wife settled upon land, and three years afterwards the wife died. The husband completed the required residence and obtained a patent. It was said in that case that, one who had been legally adopted by the husband and wife as a son was the lawful heir of the deceased wife, and had an interest in the land.

It is possible that some of the expressions in the above cases may be said to support respondents' contention here, and perhaps the conclusions upon the facts in some of them justify the contention that the decisions are decisive of this case in favor of respondents. Be that as it may, we shall now refer to recent Federal decisions. In *McCune v. Essig,* 118 Fed. 273, the following facts existed: McCune settled upon land in this state as a homestead, and made entry thereon. Within a year he died intestate, his only surviving heirs being his widow and a daughter, who continued to reside upon the land the required time for the widow to com-

plete the homestead rights. Mrs. McCune, having become Mrs. Donahue by remarriage, then made final proof and a patent was issued to her. About a year after the issuance of the patent, she conveyed the land to the defendants in the case cited. Thereafter the daughter instituted the suit to procure a decree establishing that she was the owner of an undivided half of the land. Her contention was that, when the land was conveyed by the patent to her mother, it became the property of the community composed of her father and mother; that she, as the surviving heir of the father, succeeded to his interest, and that the interest was not conveyed by the mother's deed to the defendants in the action.

The suit was begun in the superior court of this state for Lincoln county, and was removed to the United States circuit court. That court retained the cause on the ground that the question in the case was one which must be resolved by the laws of the United States, and decided that the widow, upon the issuance of the patent to her, took the entire title as her separate property, and that there was no community interest to descend to the daughter. This ruling was affirmed by the United States circuit court of appeals, ninth circuit. *McCune v. Essig,* 122 Fed. 588. The same case on appeal to the supreme court of the United States was in all particulars affirmed by a recent decision, rendered November 27, 1905, and not yet published,[1] the opinion being written by Mr. Justice McKenna. From a copy of that opinion which has been placed before us, we here quote:

"The action of the lower courts on the motion to remand and on the merits are attacked by appellant to a certain extent on the same ground, to wit, that the laws of Washington determine the title of the parties, not the laws of the United States. The interest in McCune, acquired by his entry, it is contended, was community property, and passed to appellant under the laws of the state. Sections 4488, 4489, 4490 and 4491 of the Statutes of Washington pro-

[1]See, 199 U. S. 382, 26 Sup. Ct. 78. REP.

vide that property and pecuniary rights owned by either husband or wife before marriage, or that acquired afterwards by gifts, bequests, devise or descent, shall be separate property. Property not so acquired or owned shall be community property, and, in the absence of testamentary disposition by a deceased husband or wife, shall descend equally to the legitimate issue of his or their bodies. 1 Ballinger's Code. Relying on these provisions the argument of appellant is, and we give it in the words of her counsel: 'When William McCune entered this land he had not the legal title, but he had an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of his entry. *United States v. Turner,* 54 Fed. Rep. 228. The terms of his entry were carried out. The patent issued by reason of his entry. The state legislature had the right to direct to whom that equitable right and interest should pass. If the rights and interests under that entry had been forfeited, the state law would have no effect upon the title to the land. That equitable interest ripened, and was confirmed by the patent.'

"But this is begging the question. What interest arose in McCune by his entry, who could upon his death fulfill the conditions of settlement and proof, and to whom and for whom title would pass, depended upon the laws of the United States. *Bernier v. Bernier,* 147 U. S. 242 [13 Sup. Ct. 244, 37 L. Ed. 152]. The motion to remand was rightly overruled."

After quoting the Federal statutes relating to the conditions of homestead entries and settlement, Rev. Stat., §§ 2291 and 2292, the opinion further says:

"It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die his widow is given the right of residence and cultivation, and 'shall be entitled to a patent as in other cases.' He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is as much a beneficiary of the statute as he. The words of the statute are clear, and express who in turn shall be its beneficiaries. The contention of appel-

lant reverses the order of the statute and gives the children an interest paramount to that of the widow through the laws of the state.

"The law of the state is not competent to do this. As was observed by Circuit Judge Gilbert: 'The law of the state of Washington governs the descent of land lying within the state, but the question here is whether there had been any descent of land.' And, against application of the state law, the learned judge cited *Wilcox v. Jackson,* 13 Pet. 498, 517, and *Bernier v. Bernier, supra.* In the former it was said that whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to State legislation. In *Bernier v. Bernier* it was said that the object of sections 2291 and 2292 was 'to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate.' See *Hall v. Russell,* 101 U. S. 503. And hence it was decided that Mrs. Donahue took the title free from any interest or right in the appellant under the laws of the state.

"Against the effect of the patent conveying title to Mrs. Donahue, appellant invokes the doctrine of relation. It is admitted 'that the title to the real estate in the case at bar passed and vested according to the laws of the United States by patent.' But it is contended that a beneficial interest having been created by the state law in McCune when the title passed out of the United States by the patent, it 'instantly dropped back in time to the inception or initiation of the equitable right of William McCune, and that the laws of the state intercepted and prevented the widow from having a complete title without first complying with the probate laws of the state.' This, however, is but another way of asserting the law of the state against the law of the United States, and imposing a limitation upon the title of the widow which section 2291 of the Revised Statutes does not impose. It may be that appellant's contention has support in some expressions in the state decisions. If, however, they may be construed as going to the extent contended for, we are unable to accept them as controlling."

There is no necessity for further reviewing the arguments of our own or of the Federal decisions. The above decision is final and conclusive that the question as to what title passed to Carlson must be resolved by the laws of the United States. Without regard to the community laws of this state, it follows from the decision that, when one makes a homestead entry and dies before completing the full residence period necessary under the homestead law, and leaving a widow who completes the period of residence, makes proof, and procures a patent, the land becomes the absolute separate property of such widow. In so far as our own previous decisions may be in conflict with the above, when applied to a similar state of facts, they must now be treated as overruled.

The facts in the case at bar are very similar to those in *McCune v. Essig, supra.* In the other case the husband died and the widow completed the homestead title; while in this one, the wife died within the third year of residence, and the husband commuted the homestead rights and made final proof, paying cash, and procuring patent to himself. If Carlson's title had been perfected as a homestead title, we should see no difference in principle by which to distinguish it from the *McCune* case. Our views upon this point were expressed in the case of *Hall v. Hall, ante* p. 186, 83 Pac. 108, as follows:

"True, the homestead law provides that the patent shall issue to the widow in such cases; but it seems inconsistent to hold that the widow acquires the entire title on the death of the entryman, and that the entryman only acquires an undivided one-half interest on the death of the wife, under identical circumstances. The manifest object of our community property system is to place the husband and wife on an equal footing as to their property rights, and perhaps the law should be so administered as to accord to each the same property rights on the death of the other."

The additional fact in this case, that Carlson commuted the homestead entry and paid cash for the land, strengthens appellants' position. By the consent and concurrence of

the United States, he relinquished the homestead entry and availed himself of the benefits of the law granting preemption rights. The title conveyed to him was based upon a new consideration passing from him to the United States, a consideration entirely different from the conditions which inhered in the homestead entry. We see no escape from the conclusion that Carlson took the title as his sole and separate property. It follows that respondents have no title to the lands in question and no cause of action.

The judgment is reversed, and the cause remanded, with instructions to enter judgment dismissing the action.

MOUNT, C. J., RUDKIN, FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5684. Decided December 27, 1905.]

AMELIA STARR, *Appellant*, v. AETNA LIFE INSURANCE COMPANY, *Respondent*.[1]

INSURANCE — ACCIDENT POLICY—CONSTRUCTION—EXCEPTIONS—BURDEN OF PROOF. Under the rule that exceptions from liability in accident insurance policies must be construed strongly against the insurance company, the burden of proof is upon the insurance company to establish the fact that an accident happened by reason of some act that was made an exception to the risk, in order to avoid liability, where a death from violent injuries has been shown.

SAME—POLICY—CONSTRUCTION. Under a provision in a policy of accident insurance exempting the company from liability in case of the death of the insured "being on any railroad bridge or right of way," recovery may be had where the insured, at the side of the tracks, fell or was drawn under the train; since "right of way" must be construed to mean "on the track," and not the full width of the land owned by the company.

SAME—EVIDENCE—RES GESTAE. In an action upon an accident insurance policy, statements made by the deceased explaining how the accident happened and showing that it was accidental, are admissible as part of the *res gestae*, when made to the physician, about

[1]Reported in 83 Pac. 113.

an hour after the accident, in the absence of his associates and when so mangled that an amputation of both arms was necessary and death resulted within thirty-six hours.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 6, 1905, in favor of the defendant, dismissing, at the close of plaintiff's testimony, an action on a policy of accident insurance. Reversed.

James A. Williams and *Denton M. Crow,* for appellant, to the point that it was for the jury to determine whether the deceased was on the "right of way" within the exceptions of the policy, cited: *Standard etc. Ins. Co. v. Langston,* 60 Ark. 381, 30 S. W. 427; *Equitable etc. Ins. Co. v. Osborn,* 90 Ala. 201, 9 South. 869, 13 L. R. A. 267; *Meadows v. Pacific etc. Ins. Co.,* 129 Mo. 76, 31 S. W. 578, 50 Am. St. 427; *Standard Life etc. Ins. Co. v. Thornton,* 100 Fed. 582, 49 L. R. A. 116; *De Loy v. Travelers' Ins. Co.,* 171 Pa. St. 1, 32 Atl. 1108, 50 Am. St. 787; *Traders etc. Acc. Co. v. Wagley,* 74 Fed. 457; *Matthes v. Imperial Accident Ass'n,* 110 Iowa 222, 81 N. W. 484; *Hill v. Central Accident Ins. Co.* (Pa. St.), 59 Atl. 262; *Duncan v. Preferred etc. Acc. Ass'n,* 13 N. Y. Supp. 620; *Dougherty v. Pacific etc. Ins. Co.,* 154 Pa. St. 385, 25 Atl. 739. The statements of the deceased were part of the *res gestae.* 1 Cyc. 295; *Insurance Co. v. Mosley,* 75 U. S. 397, 19 L. Ed. 437; *Leahey v. Cass Avenue etc. R. Co.,* 97 Mo. 165, 10 S. W. 58, 10 Am. St. 300; *International etc. R. Co. v. Smith* (Tex.), 14 S. W. 642; *Delaware etc. R. Co. v. Ashley,* 67 Fed. 209; *Waldele v. New York etc. R. Co.,* 29 Hun. 35; *Augusta Factory v. Barnes,* 72 Ga 217, 53 Am. Rep. 838.

Post, Avery & Higgins, for respondent, contended, among other things, that "right of way" as used in the policy did not mean "road bed." *Meadows v. Pacific etc. Ins. Co.,* 129 Mo. 76, 31 S. W. 578, 50 Am. St. 427; *Day, Williams & Co. v. Railroad Co.,* 41 Ohio St. 392; *Chicago etc. R. Co. v.*

People ex rel. Denison, 98 Ill. 350; *Chicago etc. R. Co. v. Cass County,* 8 N. D. 18, 76 N. W. 239; *Central Trust Co. v. Wabash etc. R. Co.,* 29 Fed. 546; *Keener v. Union Pac. R. Co.,* 31 Fed. 126. There is no insurance where the person is at a place excluded by the policy. *Sohier v. Norwich Fire Ins. Co.,* 11 Allen 336; *Weinschenk v. Aetna Life Ins. Co.,* 183 Mass. 312, 67 N. E. 242. The burden was upon the plaintiff to negative the existence of this condition. *American Accident Co. v. Carson,* 99 Ky. 441, 36 S. W. 169, 59 Am. St. 473, 34 L. R. A. 301; *Lilly v. Preferred Accident Ins. Co.,* 41 Misc. Rep. 585, 83 N. Y. Supp. 585. The statements of the deceased were no part of the *res gestae. Waldele v. New York etc. R. Co.,* 95 N. Y. 274, 47 Am. Rep. 41; *Savannah etc. R. Co. v. Holland,* 82 Ga. 257, 14 Am. St. 158; 2 Jones, Evidence, § 348.

DUNBAR, J.—The appellant is the beneficiary named in a certain accident insurance policy issued to her husband, Martin Luther Starr. This action was brought by appellant, as such beneficiary, to recover the principal sum of $5,000, by reason of the loss of the life of said Martin Luther Starr, as the proximate result of external, violent, and accidental means. Some of the facts were stipulated between appellant and respondent, and appear as follows: On December 6, 1903, the insured, Martin Luther Starr, was at Hatton, Adams county, Washington. At about four o'clock in the morning of said day, said Starr, with some companions, started from the hotel for the Northern Pacific railway depot. The train for Spokane was then due, and came in shortly after said Starr and his companions arrived at the depot. It was then still dark.

Starr left his companions before the arrival of the train, and when the train arrived, he could not be found by his companions, who made some search for him. Shortly after the train pulled out for Spokane, some men at the depot heard Starr calling from a direction opposite to that in which

the train had gone, and in a few moments said Starr came to the depot from the direction opposite to that the train had gone—that is, from down the track toward Tacoma—with both arms hanging limp and in a crushed condition. Within two days after said Starr was discovered as aforesaid, he died from the effect of such injuries. Before his death, his arms were amputated for the purpose of saving his life. Said Starr had not received said injuries before leaving his companions at the depot. The evidence shows that prompt notice was given the respondent of said injuries and the subsequent death of the insured, and that, within the time limited by the policy, proper proofs of death were furnished. Respondent denied any liability under the policy of insurance, and thereafter this action was brought.

The complaint set up the death by accident, the provisions of the policy, etc., and all the allegations usual in such a case. The answer admitted the issuance of the policy by the defendant, but alleged that there were other conditions and requirements in the policy, not mentioned in the complaint, wherein it was provided that the failure to comply with such provisions would work a forfeiture and loss of all rights under the policy; affirmatively alleged that the policy of insurance, described in the complaint and sued upon, contained the following provision:

"This insurance does not cover disappearance nor suicide, sane or insane, nor the result, fatal or otherwise, of injuries of which there is no visible mark upon the body (except as hereinbefore provided); nor in event of accident or death, loss of limb or sight, or disability resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, nor from sleep-walking, medical or surgical treatment, war or violating the law; nor for injuries intentionally inflicted upon the insured by himself; nor does it cover (except as incident to the occupation of railway employees) entering or trying to enter or leave a moving conveyance using steam or electricity as a motive power (except cable and electric street cars) being in any place in or on any such conveyance which has not been provided for

the occupation of passengers during transit, or being on any railroad bridge or right of way except at established crossings of such roads with public highways."

The answer further averred that the insured was, at the time of said injury, trying to board a moving railroad train at a place other than a station, or trying to commit suicide, and at said time was on, and said injury occurred on, the right of way of the Northern Pacific Railway Company's railroad, and at a place that was not then an established, or any, crossing of such railroad with a public highway; that said railroad right of way at the place where said injury occurred was at the time four hundred feet wide, and that the said railway company's railway tracks ran approximately in the center of said right of way. The reply admitted the exceptions specified in the answer in the affirmative defense, but denied the other allegations. At the conclusion of the plaintiff's testimony, upon motion of defendant, the case was taken from the jury, on the ground that there was not sufficient testimony to sustain a verdict, and an order of dismissal was made. From the judgment following this order, this appeal is prosecuted.

It is alleged that the court erred in sustaining respondent's challenge to the sufficiency of the evidence, and in refusing to permit certain testimony which we will hereafter refer to. It appears from the record, and the statements made by the court, that the court was of the opinion that the burden of proof was upon the appellant to show that the death of the insured did not occur by reason of some of the exceptions incorporated in the policy. From an examination of all available authority on that subject, we are forced to the conclusion that the court erred in this particular. It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of

this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the supreme court of Alabama, in *Equitable Accident Ins. Co. v. Osborn,* 90 Ala. 201, 9 South. 869, 13 L. R. A. 267:

"Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy."

In conformity with this rule, an examination of the subject shows that almost universal authority imposes upon the insurance company the burden of establishing the fact, in an action on an accident insurance policy, that the accident happened by reason of something that was excepted from the provisions of the policy; and that the burden is not imposed upon the insured to affirmatively show that the accident did not occur by reason of any or all of the exceptions incorporated in the policy. The rule is thus announced in 1 Cyc. 289:

"As to accidental character of injury. On an issue as to whether the injury to or death of the insured was caused by accidental means or by some cause excepted by the policy, the legal presumption is against the insanity of insured, intentional injuries by third persons, lack of due care and diligence, self-inflicted injuries, and suicide. These presumptions may be overcome, however, by facts and circumstances establishing the contrary."

Further, under the head of Burden of Proof:

"The burden of proof is on plaintiff to show that the injury or death was due to accidental or other means specified in the policy, . . . The burden rests on the defendant to

show that the policy has been avoided by reason of a breach of some condition precedent, or that the injury or death was caused by some act which is made an exception to the risk in the policy, or that the action was not brought within the time required by the policy."

Meadows v. Pacific Mut. Life Ins. Co., 129 Mo. 76, 31 S. W. 578, 50 Am. St. 427, is a case almost identical in circumstances and in principle with the one at bar. There it was shown that the deceased left the depot for the purpose of boarding a freight train standing at the station, and was soon after found mangled on the railroad track; and it was held that, under such proof, in the absence of other evidence, the death was accidental. From a long and carefully considered opinion, in which many cases are reviewed, we quote the following excerpt:

"The plaintiff showed beyond controversy that Daniel Meadows died of violent injuries, which were plainly visible upon his body; that the nature of these injuries left no doubt that they were the sole cause of his death and proper proofs were made. Here he rested. He had made a *prima facie* case, unless we are required to presume that because he was killed by being run over by cars on a railroad track, he was voluntarily exposing himself to unnecessary dangers and was violating his agreement in regard to being upon a roadbed of a railroad, within the meaning of the policy. Such a presumption would destroy the presumption indulged by the law that Meadows was at the time exercising proper care for his safety. In the absence of all evidence to the contrary the law presumes that he was exercising due care for his protection;"

quoting from *Allen v. Willard*, 57 Pa. St. 374, where the court said:

"The natural instinct which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feeling and natural instincts are allowed to have their weight."

The court then quoted from *Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 6 S. W. 464, where it was said:

"There is no contributory negligence in the case, so far as the evidence in the record goes. It can only be found by indulging in unwarranted presumptions. The only presumption the law indulges in respect thereof is, that the deceased was in the exercise of ordinary care and diligence at all times in the discharge of his duties until the contrary appears;"

citing *Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503; *Huckshold v. St. Louis etc. R. Co.*, 90 Mo. 548, 2 S. W. 794; and *Crumpley v. Hannibal etc. R. Co.*, 111 Mo. 152, 19 S. W. 820, to the effect that it was not incumbent upon plaintiff in the first place to prove that the deceased was in the exercise of ordinary care and prudence; and *Mallory v. Traveler's Ins. Co.*, 47 N. Y. 52, 7 Am. Rep. 410, and *Lancaster, Adm'r v. Washington Life Ins. Co.*, 62 Mo. 121, to the effect that, in the absence of all evidence as to how the insured came to be thrown under the train which killed him, the presumption was that it was the result of accident.

Another carefully prepared opinion is that of Judge Day of the United States circuit court, in the case of *Standard Life & Acc. Ins. Co. v. Thornton*, 100 Fed. 582, 49 L. R. A. 116, where, after an analysis and review of the authorities, it was said:

"This presumption must stand in the case, and be decisive of it, until overcome by testimony which shall outweigh the presumption. It casts upon the defendant who claims that the death was intentional the burden of establishing it by a preponderance of testimony."

Where, in an action on a contract of insurance, it is claimed that death resulted from one of the excepted causes enumerated on the back of the policy, it was held in *Railway Officials & Employees' Acc. Ass'n v. Drummons*, 56 Neb. 235, 76 N. W. 562, that the plaintiff was only required to bring her case within the terms of the policy appearing on its face; that she was not required to negative the conditions or exceptions indorsed thereon; that in declaring on a con-

tract which contains exceptions, conditions, or provisos, it is not necessary for the pleader to do more than allege the general clause under which his cause of action has arisen; that he is not obliged to set out and negative a distinct clause which operates as an exception to the general clause, but which was not incorporated in it; that such condition afforded the basis for an affirmative defense which would defeat a recovery if sustained by adequate proof; and that the burden of proving that death resulted from any of the causes enumerated on the back of the policy was on the defendant; citing *Anthony v. Mercantile Mut. Acc. Ass'n,* 162 Mass. 354, 38 N. E. 973, 44 Am. St. 367, 26 L. R. A. 406; *Granger's Life Ins. Co. v. Brown,* 57 Miss. 308, 34 Am. Rep. 446; *Home Benefit Ass'n v. Sargent,* 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160.

But it is needless to quote authority, for the overwhelming weight of judicial opinion sustains this rule. In fact, this is not denied by the learned counsel for respondent, but he asserts that good law is not made of numbers of authorities, and that logic alone is weight. Outside of the presumption, which ordinarily attaches, that the numerical weight of authority correctly expresses the law, an examination of the authorities on this proposition, together with the reasoning advanced to sustain the decisions, convinces us that the appellant's contention must be sustained, not only by the numerical strength of decision but by the weight of logic.

If it be true, then, that the burden was upon the respondent to show that the death of the insured was caused by an infraction of some of the provisions which were exceptions to the provisions of the policy, the cases relied upon by the lower court and decided by this court, viz., *Armstrong v. Cosmopolis,* 32 Wash. 110, 72 Pac. 1038, and *Reidhead v. Skagit County,* 33 Wash. 174, 73 Pac. 1118, would sustain the appellant's contention instead of the decision of the court. Those were personal damage cases, where a recovery could be based only upon the negligence of the defendant; and the

announcement by this court that jurors should not be allowed to guess at how an accident occurred, but that there must be some proof on that subject before a recovery could be had, would apply here to the proof which must be demanded of the respondent. A *prima facie* case having been made out by the appellant, the negligence of the insured in violating any of the excepted causes in the contract must be proven by the respondent.

On the proposition which might arise on a retrial of the cause in relation to the meaning, within the contemplation of the parties to the contract, of the phrase "right of way," there seem to be no direct adjudications. It is not contended by the respondent that the expression "right of way," as used in the policy, contemplates the full four hundred feet right of way that this company has where the accident happened, but that it means something more than the mere roadbed. Contracts of this kind, like other contracts, must be construed with reference to what was the probable intention of the parties. What interest was to be protected; what danger guarded against? Construing this contract in the light of these queries, and not being bound by its pure literalism, we must conclude that the object of the precautionary provision was to prevent recovery for accidents by cars. Such accidents must of necessity happen on the road bed. It is plain that the occupancy of the right of way outside of the roadbed would not increase the hazard, and we are inclined to construe the expression "right of way" as meaning the way that the train has a right to travel, and can travel, viz., on the track, which designates the only ground over which the train *can* travel, and the only place at which it can do any injury to any one trespassing on its right of way.

After the court had indicated its view as to where the burden of proof rested in this case, the appellant asked to have the case opened for the purpose of introducing testi-

mony in relation to the circumstances under which the accident happened. Leave was granted, and witness Munger was called to testify in that particular. Mr. Munger testified, that he was called immediately after Starr was discovered; that he was at his home about three blocks from the depot; that he at once dressed and went to the depot, found Starr lying on the floor with his arms crushed, and within ten or fifteen minutes thereafter the statement was made to Mr. Munger and Dr. Marion which the appellant offered in evidence. The witness stated that he thought it was about an hour after the accident when this statement was made by Starr. His only way of estimating the time, however, was by the fact that he had been sent for and had had time to dress, and that it was a few minutes after he arrived at the depot when Starr made the statement. This testimony was objected to by counsel for respondent, and the objection sustained on the ground that the testimony was not a part of the *res gestae,* too long a time having elapsed after the accident before the statement was made by Starr to the witness. The offer was as follows:

"Mr. Williams: I offer to show by this witness that the deceased and insured, Martin Luther Starr, just after the accident, at the time that the witness talked to him as has already been stated, stated to the witness that he had reached the depot before the train arrived, and that he left the depot for the purpose of attending to a call of nature and crossed the track, went over back of the warehouse; and will show by evidence if I can that the warehouse was in the direction of Tacoma from this road, this highway crossing; and that while he was there the train came in sooner than he expected, and stopped. He found the train a vestibuled train and he could not board the train from the side on which he was then and that the only way that he could get aboard the train was to go around the rear of the train, and that he started to run around the rear of the train, that he stumbled and fell and struck his head against a railroad tie or some other obstruction and was rendered unconscious, and in that condi-

tion he remained until after the train pulled out, and that when the train pulled out he discovered then that he had sustained these injuries which he had at the time he was found by these persons; and intend to show by other evidence than this witness to make the connection, after I have introduced this evidence, that at the time of the injury he was on this highway that was crossing the track."

It may be that, under the rule which we have announced in relation to the burden of proof, appellant, upon a retrial of this case may not find it necessary to again offer this testimony; or it may be that testimony may be offered by the respondent in relation to the manner in which this accident occurred which will necessitate the offer of this proof. So that, in view of a contingency of that kind, we think it best to pass upon the admissibility of the testimony offered. The ordinary rule is that a statement of this kind must have been made so recently that it would leave no room for collusion or premeditated self-serving. But no time can be arbitrarily fixed, it depending so largely upon the circumstances of each individual case. In *Dixon v. Northern Pac. R. Co.*, 37 Wash. 310, 79 Pac. 943, we held that fifteen minutes was not so long a time as would exclude the testimony; and in *Roberts v. Port Blakeley Mill Co.*, 30 Wash. 25, 70 Pac. 111, that testimony given within three hours after a railroad accident had occurred could be admitted as *res gestae*. In this case, considering the facts that the man's associates had left him, and that he was so mangled and crushed that an amputation of his arms was necessary, and that he died within thirty-six hours of the accident, it would be a violent presumption to indulge that the statement was made for a self-serving purpose; and we think that the refusal of testimony under such circumstances would tend to work an injustice by excluding testimony which would have a tendency to throw light on a transaction which would otherwise be obscure for want of evidence.

Under all the circumstances of the case, we think the judg-

ment must be reversed and a new trial granted, and it is so ordered.

Mount, C. J., Hadley, Fullerton, Rudkin, and Root, JJ., concur.

Crow, J., having been of counsel, took no part.

[No. 5687. Decided December 28, 1905.]

J. A. Irby, *Appellant*, v. J. H. Tilsley *et al.*, *Respondents*.[1]

Fraud—Action for Damages—False Representations as to Mine—Inspection by Vendee. One who purchases stock in a mining company is not entitled to rescind the sale for fraudulent representations, where it appears that within a week or two he had made a full investigation of the mine and other properties of the company, expressed himself as satisfied, and purchased more stock and dealt in it, for himself and as agent on commissions at a profit, and did not commence an action for damages for more than a year, at which time the mine had proved unprofitable.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered May 31, 1904, in favor of the defendants, upon the verdict of a jury entered by direction of the court, dismissing an action for damages for false representations. Affirmed.

Peacock, Wells & Ludden, for appellant.

Richard M. Barnhart (Barnhart, Laughon & Pugh, of counsel), for respondents.

Crow, J.—This action was instituted by appellant J. A. Irby, plaintiff below, against respondents J. H. Tilsley, William Lambert and The New Jersey Gold Mining & Milling Company, a corporation, defendants below, to recover damages for false and fraudulent representations made by respondents on certain sales of stock of said corporation. On a jury trial, the court at the close of appellant's evidence sus-

[1]Reported in 83 Pac. 97.

tained a challenge thereto, and directed a verdict in favor of respondents. From a judgment entered on said directed verdict, this appeal has been taken.

Appellant produced evidence tending to show that said Mining Company, of which Lambert was president and Tilsley secretary, owned certain claims, near Wardner, Idaho, which it was operating, the principal office of the company, and the residence of all the parties, being at Spokane, Washington; that a two stamp mill had been erected, certain water power secured, and much work done; that on or about January 6, 1903, respondents Tilsley and Lambert approached appellant for the purpose of inducing him to invest in some of the stock of said company held by them; that they presented appellant with a printed pamphlet or prospectus which represented the property of said company to be a mine, and not a prospect; that the company had certain water rights capable of producing 250 horse power, and being used to run a forty stamp mill, which was to be installed in the near future, that the property was a free milling proposition, with two million dollars worth of ore in sight of an average value of from eight to fourteen dollars per ton, and that all these facts could be easily verified by an inspection of the property; that said respondents themselves made the same representations orally, further asserting the outlook to be even better than shown by the prospectus. Appellant testified that, relying on the truth of these statements, he on January 9, 1903, traded certain real estate in Spokane to respondents Lambert and Tilsley, for 9,000 shares of their stock, at ten cents per share, and also purchased 1,000 shares of treasury stock at the same price. He now claims that all the statements contained in the prospectus and made by respondents were false, and were at the time known by them to be false.

After carefully examining all the evidence, we conclude the trial court committed no error in directing a verdict for respondents. Without stating our conclusions as to whether

the evidence was sufficient to show the representations to have been false, we will proceed upon the assumption that it was sufficient for that purpose. Appellant testified that, within a week or two after he traded for said 10,000 shares of stock, he made a trip to the mine, remained there several days, examined the property, saw the mill, the water power, the tunnels and shafts, met and talked with the foreman and workmen, and procured samples of ore which he brought with him to Spokane. Shortly after his return, he met respondents, and instead of expressing any dissatisfaction with his investment or the property, he traded with respondents for 15,000 additional shares of their stock at the same price of 10 cents per share, and thereafter, at sundry times, acquired still more stock. He also agreed to, and did sell treasury stock for the company upon commission, and in doing so told prospective purchasers he had visited the mine, showing them samples of quartz with free gold visible which he had taken out. On cross-examination he testified in part as follows:

"Q. Didn't you show Mr. Castle Thompson at the time that you sold him a hundred dollars' worth of stock at 12½ cents a share, a piece of quartz with free gold visible to the naked eye, and tell him that you got that out of the mine yourself? A. I did. Q. Did you get that out of the mine yourself? A. I did."

He further testified that he had sold 10,000 shares of treasury stock to one Williams for 12½ cents per share earning for himself a commission of $200, and that he had made other sales of treasury stock, and his own stock at a profit. He told one Doust that, when he examined the mine, he found the work done as represented. On April 5th, 1904, after the commencement of this action and before trial, he sold 30,000 shares of his stock to one Sargensen for $1,500. There is some intimation in the record that Sargensen made this purchase for respondent Tilsley, but this does not clearly appear, although at the trial Tilsley, who was called as a

witness for appellant, claimed he then owned the stock. The dealings above enumerated are only a part of those made by appellant after his return from the mine, but are sufficient to show his course of procedure. During all this time the mine was operated by the company. In the summer of 1903 a larger stamp mill was installed, and operated until the following December, when, having proved unprofitable, it was shut down. Shortly thereafter appellant brought this action to recover losses actually sustained, and also damages to his business standing and reputation caused by his selling treasury stock to his friends.

Even though it be conceded that all the representations made by respondents prior to appellant's original purchase on January 9, 1903, were false, yet appellant is not entitled to recover. On his visit to the mine, he could see the situation for himself. By his subsequent acts he expressed entire satisfaction with his investment. He did not need to say he was satisfied. His actions spoke louder than words, and could not be misunderstood. If, within a reasonable time after his return from the mine, he had commenced an action either to rescind or to recover damages, he might have had some standing in a court of justice. Instead of this, he purchased more stock, and his rights should now be ascertained with reference to the knowledge he possessed and the situation as it existed at the time of his second purchase. He was not thereafter entitled to rely on representations made by respondents.

In *Zilke v. Woodley,* 36 Wash. 84, 78 Pac. 299, it appeared that appellant Zilke and his assignors employed respondent Woodley to locate them on certain timber claims, and made certain advance payments before seeing the land; after they were located by Woodley and had seen the land, they deposited certain drafts in a Spokane bank for collection, the proceeds to be passed to the credit of Woodley. When the bank collected the drafts both appellant and respondent claimed the money, which the bank then paid into

court under the provisions of Bal. Code, § 4843 *et seq.* By his pleadings and on the trial Zilke not only claimed the proceeds of the drafts, but also sought to recover the advances made. This court, speaking through Hadley, J., said:

"It is further claimed that it was error to confine the testimony of appellant concerning false representations of respondent as to the timber claims to the period after the parties returned from viewing the land. We think the court was right. Any representations made before the parties viewed the land were not pertinent, for the reason that, after viewing the land for themselves, they no longer had a right to rely upon such representations, and they thereafter proceeded in the light of their own knowledge from actual view of the premises and surroundings. This court has frequently held that one who has the means of knowledge before him, and who refuses or neglects to avail himself thereof, is prevented from asserting that he is defrauded."

We think this doctrine should be applied to appellant Irby. At all times after his return from the mine, he dealt at arms length, no fiduciary or confidential relation existing between him and respondents, and he cannot now claim any fraud based on false representations made either before or after he visited the mine. *Washington Cent. Imp. Co. v. Newlands,* 11 Wash. 212, 39 Pac. 366; *West Seattle Land & Imp. Co. v. Herren,* 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand,* 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell,* 26 Wash. 576, 67 Pac. 216; *Samson v. Beale,* 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeny,* 29 Wash. 321, 69 Pac. 1117; *Hulet v. Achey,* 39 Wash. 91, 80 Pac. 1105.

Appellant, however, testified that, when he visited the mine, he could not see the ore on the dump nor judge its value, as it was covered with a deep snow. He did see the walls in the tunnels and shafts, and took samples of ore therefrom. He also claims he knew nothing about a mine, but was compelled to rely on respondents' statements. But he did undertake an examination for the purpose of informing himself and exercising his own judgment; respondents

did not direct him, nor were they even present. He afterwards exhibited to prospective stock buyers samples of ore which he personally took from the mine. He was then making a commission on sales of treasury stock, and also a profit on his own stock. It is apparent from the record that appellant was satisfied until the mill closed. When his stock depreciated in its market value, then it was he first claimed he had been defrauded. We find no error in the record. The judgment is affirmed.

MOUNT, C. J., RUDKIN, FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

[No. 5864. Decided December 28, 1905.]

THOMAS LYNCH, *Appellant*, v. ENOS B. CADE *et al.*, *Appellants, and* SARAH J. MILLAR, *Respondent*.[1]

MORTGAGES—WITHOUT ACTUAL ACKNOWLEDGMENT—VALIDITY AS BETWEEN PARTIES—ESTOPPEL IN EQUITY TO QUESTION VALIDITY. A purchase money mortgage without actual acknowledgement, signed by the mortgagees when a certificate of acknowledgement was already filled out and signed, is valid as between the parties or purchasers of the property with notice.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered March 30, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. E. Foster and *S. H. Steele*, for appellants.

Thomas B. MacMahon and *George McKay*, for respondent.

MOUNT, C. J.—Plaintiff brought this action to remove a cloud from the title of certain real estate. He alleged in the complaint, in substance, that he was the owner of the prop-

[1]Reported in 83 Pac. 118.

erty; that, prior to the time he purchased the same, E. B. Cade and wife, his grantors, signed a blank mortgage and delivered the same to defendant Sarah J. Millar, who, without the knowledge or consent of said Cade and wife, filled in the blanks in said mortgage, including a debt for $1,575, and wrote a description of said property therein, and without the knowledge and consent of said Cade and wife, had a notary public attach an acknowledgment thereto, regular in form and in all respects untrue and false, and filed the said mortgage for record; that the said mortgage was void and of no force or effect, and cast a cloud upon the title of appellant's property.

For answer the respondent, Sarah J. Millar, denied all the allegations of the complaint, and alleged affirmatively that, on August 24, 1904, she was the owner of real property described in the mortgage, and that on the said day she sold said property to Cade and wife for the sum of $2,200; that $1,575 of the purchase price of said real estate was paid in stock of a corporation, at the agreed price of ten cents per share; that at said time Cade and wife entered into an agreement, in writing, guaranteeing the price of said stock at ten cents per share for one year, and agreeing that, at the end of the year, they would purchase all of said stock which respondent Millar had not then sold at ten cents per share; that to secure the said contract Cade and wife executed a mortgage upon the property for $1,575; that said respondent, at the end of the year, had been unable to sell one thousand shares of the said stock, and that the same was worthless; that she had tendered said stock to said Cade and wife, and that there was due at the time of the answer one hundred dollars, for which the mortgage was security; that the plaintiff took title to the property with notice of respondent's lien. She then prayed for a foreclosure of the mortgage. Cade and wife denied the answer of respondent. Plaintiff replied to respondent's answer, and denied substantially the allegations of the answer. At the trial, Cade

and wife assumed the burden of plaintiff's case. Findings were made in favor of the defendant Sarah J. Millar, and a decree of foreclosure was entered. Plaintiff and defendants Cade and wife have appealed.

It is conceded in the case that the appellant Lynch had notice of the mortgage, and is prosecuting this action for the benefit of Cade and wife, who have agreed to pay all expenses in connection with the case, and to pay whatever judgment is obtained against the land or said Lynch. Cade and wife are therefore the real parties in interest. At the trial Cade and wife admitted, on the witness stand, that they purchased the lot from respondent Millar; that they paid $1,575 of the purchase price in stock of the Tide Power Fog Signal Company, a corporation, and agreed to guarantee the price of said stock at ten cents per share for one year, and to repurchase at ten cents per share all that Mrs. Millar had not sold at the end of the year; that they intended to give a mortgage on the lot to secure the contract, and that they signed a blank mortgage for that purpose. They maintain, however, that the mortgage they signed was an entire blank printed form, without the description of the land, and that it was not acknowledged, and the notary's blank acknowledgement was not signed by the notary.

Respondent Millar conceded that the acknowledgement of the mortgage was not taken, as a matter of fact, but claims that the acknowledgement was properly filled in, and that the notary had signed the same prior to the execution of the mortgage by the appellants Cade and wife. Respondent's evidence tended to show, and the trial court found, that the blank mortgage, before it was executed, was properly filled out, with the amount which it was given to secure, and with the description of the land given as security, and that the notary's acknowledgment was upon the mortgage at the date it was signed by Cade and wife.

The only point seriously contended for on this appeal is

that the mortgage was void because it was not, in fact, acknowledged. Conceding that the mortgage would be void as to the purchasers without notice or creditors of the mortgagors, it was good as between the parties. *Mann v. Young,* 1 Wash. Ter. 454; *Edson v. Knox,* 8 Wash. 642, 36 Pac. 698; *Carson v. Thompson,* 10 Wash. 295, 38 Pac. 1116. We have seen that Cade and wife, who executed the mortgage, are the only parties in interest in this action. They admitted that they intended to give a mortgage upon this piece of land to secure a part of the purchase price, and the court found from the evidence that they signed the mortgage, perfect in form, and which they intended to give. The court was amply justified from the evidence in finding this fact. Cade and wife cannot be permitted to come into a court of equity and say that the mortgage which they intended to give is void, and thus defeat the payment of the purchase price of the land which they bought, and upon which they gave the void mortgage back to secure the same. If they did not acknowledge the mortgage, they intended to do so, and should have done so. They cannot in this action be heard to say they did not. The mortgage should therefore be held valid as to them.

The judgment is affirmed.

DUNBAR, CROW, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

[No. 5754. Decided December 28, 1905.]

HELEN E. SHANNON *et al., Appellants,* v. THE CITY OF TACOMA, *Respondent.*[1]

MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — CONTRIBUTORY NEGLIGENCE—EVIDENCE. The fact that a person travels on a sidewalk known to be defective when there was another route that might have been taken, may be shown upon the issue of contributory negligence.

APPEAL—REVIEW—HARMLESS ERROR. Error in allowing answers to immaterial questions is not prejudicial to the appellants when the answers thereto were unfavorable to the respondent.

SAME—In an action for injuries received in a fall upon a defective sidewalk, it is harmless error to exclude evidence to the effect that a week after the accident a hole was found in the sidewalk near by a broken piece of board, where it was conceded that there was such a hole in the sidewalk, and that the boards were decayed, the testimony being only cumulative.

NEW TRIAL—JURORS—MISCONDUCT. A new trial for misconduct of a juror in want of attention to the testimony should not be granted on conflicting evidence, and where it appears that the juror was not wilfully guilty, or that the parties were mistaken as to his acts.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—EVIDENCE—SUFFICIENCY. In an action for injuries received in a fall upon a defective sidewalk, a verdict for the defendant is justified where there was little or no evidence that the injury was caused by the defects.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence should not be granted where it is only cumulative of admitted facts, and does not go to aid that part of the case which was lacking in sufficiency of proof.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 7, 1904, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

Govnor Teats, for appellants.

O. G. Ellis, J. J. Anderson, and *R. E. Evans,* for respondent.

1Reported in 83 Pac. 186.

FULLERTON, J.—The appellant Helen E. Shannon, while walking along a sidewalk in the city of Tacoma, received an injury to her foot, and this action was brought to recover therefor. In their complaint the appellants allege that the respondent city negligently allowed the walk where the injury occurred to become worn out and decayed and otherwise out of repair, and that there was, at the time of the accident, a hole therein some eight inches wide and three feet long; that the appellant Helen E. Shannon, while walking along the same in the night time, stepped into the hole, caught her foot therein, and strained and tore away the ligaments of the foot and leg, leaving her permanently crippled and maimed. It was further alleged that the defective condition of the walk was known to the city authorities long prior to the injury, and that they negligently failed to repair the same. Issue was taken on the allegations of the complaint and a trial had, which resulted in a verdict and judgment for the city.

The first error assigned is predicated on the cross-examination of the witness Ada Shannon. It was shown in her examination in chief that she was the daughter of the plaintiffs, and accompanied her mother at the time of the accident. The following appears in her cross-examination:

"Q. You had gone along this sidewalk before this night? A. Yes, sir. Q. And knew something of the condition of the sidewalk? Mr. Teats. Objected to as immaterial. The Court. The objection overruled. Mr. Teats. Plaintiff notes an exception. Q. You knew something of the condition of that sidewalk, didn't you? A. Yes, sir. Q. As you told Mr. Teats, you knew it was in a bad condition? A. Yes, sir. Q. How did you happen to go along that way that night? A. I don't know for any certain reason, only that is a little,— Mr. Teats. That is objected to as absolutely immaterial. (After argument) The Court. The objection overruled. Mr. Teats. Plaintiff notes an exception. Q. I will ask you how you happened to take that street that night? A. We didn't decide any certain way we would go, but I knew the sidewalks on Anderson and Seventh both were

poorer than on Pine street. Q. But you often went that way? A. No, up Oak, to the bicycle path. Q. That was the way you and your family went? A. Yes, sir. Q. As a matter of fact, didn't you usually take the route you did that night? A. I did, when alone. Q. Didn't you take that with your mother? A. I don't think so. Q. Didn't you ever go? A. We didn't go there very often, and I don't think so. Q. Why should you and your mother select that route if you thought it was worse? Mr. Teats. That is objected to as immaterial. Mr. Ellis. I want to test the witnesses' memory and accuracy. Mr. Teats. She stated that she went that way going to school. The Court. The objection overruled. Mr. Teats. Plaintiff notes an exception. Q. It was just as near across that way as the other way to Mrs. Mathers? A. Yes, sir."

It is contended that this was error, because it permitted counsel to examine upon an immaterial matter prejudicial to the appellants. It is argued that a person has the right to travel upon any of the open sidewalks of a municipality, and that a person so doing cannot be guilty of contributory negligence, even though the walk be defective or dangerous, and the person traveling upon it knows it to be so. Such, however, is not the rule. While the fact that a person travels along a sidewalk known by him to be defective and dangerous does not, of itself, convict him of contributory negligence in every case where injury occurs, yet it is always some evidence of such negligence, and may be shown to the jury in support of a plea of contributory negligence. Where the danger was slight and trivial, the probative effect of the fact is likewise slight, but the proof increases as the dangers increase, and when it reaches the stage where an attempt to pass over the way would of itself plainly and unequivocally amount to the want of ordinary care and prudence, contributory negligence is established as a matter of law. But generally the presumption arising from the fact is not conclusive. It is open to question whether the incurring of the probable and possible hazard of using the way is consistent with the exercise of ordinary care and prudence. In such cases the ques-

tion becomes a mixed one of law and fact, and is for the determination of the jury under proper instructions. But it is not the rule that one may use a way which he knows to be dangerous with impunity; he must use care commensurate with the danger, and unless he does so, he is guilty of contributory negligence and cannot recover for an injury suffered because of the dangerous condition of the way, no matter how negligent the authorities whose duty it was to repair it may have been. There is nothing in the case of *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743, that is contrary to this rule. It was not there said, nor was it intended to be said, that contributory negligence could not be established by showing that the injured plaintiff had used a defective or dangerous way without the exercise of ordinary care.

It may be that the questions objected to were immaterial because there was no showing, or offer to show, that the witness had imparted her knowledge of the defect in the walk to her mother, prior to the time of the injury, but this does not require a reversal of the case. The answers to the questions were not prejudicial to the appellants. If they reflected upon either party, it was upon the respondent, and error without prejudice is not a ground for reversal.

With reference to the witness Teats, the following appears in the record:

"Mr. Teats. On agreement of counsel that he will not enforce the rule, that he will not prevent me from addressing the jury, I would like to be sworn to identify 'Identification B.' I don't like to do this, but it seems I am the only witness on the point. Govnor Teats, a witness on behalf of plaintiff, being first duly sworn, testifies as follows: About— Mr. Ellis. Just a moment. Counsel has taken the stand for the purpose of identifying this piece of board marked 'Identification B'; now, counsel, of course, will proceed to make his statement without questions, and we insist if he does the first thing he does is to qualify by stating positively that he knows exactly where the accident occurred, before he is allowed to make any statement whatever. The Court. I will hear whatever the witness has to state and if he states anything objec-

tionable, you can interpose your objection at the time. By Mr. Teats. I live at South Oaks and South Fourteenth. I think about a week after the accident I was called upon by— I went to call on Mrs. Shannon at her request, and she informed me where she was injured. I am acquainted with the sidewalk, and have been for ten years, between South Seventh and Sixth avenue. Upon her information I went to the place— Mr. Ellis. Now you Honor, we object to this on the ground that counsel has not shown that he knows where the injury occurred, and therefore is not competent to identify the place. It is a self-serving declaration through an attorney, and clearly inadmissible on any theory; if such evidence could be admitted there would be no limit. A client could state facts in a general way to counsel; counsel could take the stand and swear from those facts and create any state of facts; there must be a limit drawn somewhere. The Court. There is force in counsel's contention, the court recognizes; at the same time I am inclined to the view that in a matter of this kind, probably it is a question for the jury rather than the court. Mr. Ellis (After further argument). We object on the further ground that the witness' testimony would necessarily be hearsay, as attempting to show where the injury occurred by hearsay. The Court. The objection overruled, on both grounds. Mr. Ellis. Defendant notes an exception. By Mr. Teats. I proceeded on the east side of Pine street from South Seventh towards Sixth avenue, and about one hundred feet toward Sixth avenue from South Seventh I found a hole in the sidewalk on the left hand side going, on the street side, and in the bottom of that hole I found 'Identification B'— Mr. Ellis. I move to strike on the further ground that witness has stated in the opening of his statement that this was a week—about a week after the accident is alleged to have occurred, and the evidence would be incompetent as to showing the condition of the walk, or tending to show the condition of the walk when the accident occurred. The Court. Your objection may be sustained on that ground. The condition of the walk at some comparatively long period of time after the happening of the alleged accident would not be competent. Mr. Teats. This is a week after, and is not for the purpose of showing the condition of the walk, but for the purpose of how and where I found this 'Identification B.' Mr. Ellis. That is exactly what we are

objecting to. The Court. I think such a period of time having elapsed it would be very unsafe to admit testimony as to what was found. A week after the accident the court or jury would have no means to know what occurred. Mr. Ellis. We move to strike out all of counsel's testimony. The Court. I will sustain the motion. Mr. Teats. Plaintiff excepts to the striking of the testimony. Mr. Teats. I found no other hole of any dimension— Mr. Ellis. We object to further testimony as to the condition of this sidewalk, on the ground stated. The Court. The objection sustained. Mr. Teats. Plaintiff notes an exception. Mr. Ellis. We move to strike the last statement of witness. The Court. The motion sustained, and exception allowed."

Counsel now argues that this was error, because the piece of board was competent evidence for two reasons; first, it showed the rotten condition of the walk; and second, the size of the hole into which the injured appellant stepped. But it will be observed that, when objection was made to the statements of the witness, counsel disclaimed distinctly that the evidence was for the purpose of showing the condition of the walk, and the purpose expressed excluded the other reason. It would seem that he could not complain now of the court's ruling unless the evidence was admissible for the purpose he sought to introduce it. He said its purpose was to show how and where "Identification B" was found. But plainly it was an immaterial question how and where "Identification B" was found, unless he intended to offer it in evidence, and of this he gave no intimation, either by offering it, or stating that it was his purpose to so offer it. But if we accept the the theory of the appellants, the court's ruling would not be fatal to the judgment. That there was a hole in the sidewalk at or near the place where the appellant received the injury, and that it was of the size and character described in the complaint, was testified to by all the witnesses who were asked concerning the condition of the walk. All of them testified, also, that the boards in the walk were more or less decayed. In fact, on neither of these questions was there

any dispute in the evidence. This rejected evidence could therefore have been but cumulative of an undisputed fact, and for the court to limit the amount of evidence upon an undisputed question is never a ground for a reversal.

Many exceptions were taken to the instructions given the jury and assigned as error in this court, but we have found it unnecessary to notice them separately. The charge as a whole was a clear exposition of the law when applied to the issues in the case and the facts before the jury, and we have repeatedly held this to be sufficient, even though it may contain expressions which would state the law too broadly or incorrectly if standing alone or read apart from the context in which such expressions are found.

Error is assigned on the ruling of the court denying the motion for a new trial. The questions raised by the motion not heretofore considered, are misconduct of a juror, that the verdict of the jury is not supported by the evidence, and newly discovered evidence. The specific charge against the juror is that, while the injured appellant was testifying, the juror read from a pamphlet which he took from his pocket, paying no attention to her testimony whatever, and that, when a certain other witness for the appellants was testifying, the juror rolled the pamphlet into the form of a tube through which he looked at the witness. The affidavits making these charges are specifically denied by the accused juror, and his denial is supported by the jurors sitting next to him and behind him, to the effect that they saw no such conduct on the part of their fellow juror. Passing over the question whether the acts charged against the juror would be cause for reversal if admitted or satisfactorily proven, we cannot think the evidence submitted justifies the conclusion that the juror was wilfully guilty of the acts charged. If the question were reduced to one of veracity between the parties, we would hesitate before concluding that the weight of the proofs was against the juror, but the question is not reduced to this. There was room for an honest mistake on the part of the

persons making the charges, and we prefer to believe that they were honestly mistaken, rather than that perjury was committed by one side or the other.

On the second question, we think the verdict not contrary to the evidence. There was little or no evidence to support the allegation that the defect in the walk caused the injury, and the jury were justified in finding against the appellants on this ground. It is not enough to show that a person received an injury while traveling along a walk, and that the walk was defective; it must be shown by a preponderance of the evidence that the defect caused the injury before a recovery can be had.

The newly discovered evidence went only to the condition of the walk. It was to the effect that the walk had been long out of repair, and that a hole of the size and dimensions described in the complaint existed in the walk prior to the time of the injury. But, as we have stated before, the jury could not have found against the appellants on this branch of the case. There was no dispute, as we read the record, of the fact that the walk was out of repair, and that a hole existed therein prior to the time of the accident. But there was room for the contention that the proofs failed to show that the defective walk or the hole in the walk caused the accident, and additional evidence on the first question could in no way aid the want of proof on the latter. Conceding, therefore, that the appellants have made a showing sufficient to excuse their failure to procure the additional evidence at the trial, it can avail them nothing, since the new proofs do not go to that part of the case where proof was wanting.

As we find no substantial error in the record, the judgment must stand affirmed, and it is so ordered.

MOUNT, C. J., HADLEY, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5809. Decided December 28, 1905.]

AMELIA STARR, *Appellant*, v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Respondent*.[1]

INSURANCE—RECEIPT AND APPLICATION—CONFLICT—CONSTRUCTION. Where an application for insurance upon a printed form conflicts with the statements of a written receipt, the latter controls.

LIFE INSURANCE—BINDING RECEIPT—DEATH PRIOR TO ISSUANCE OF POLICY. Where an insurance solicitor receives the first payment on a life insurance policy and issues a written receipt reciting that the policy (to be thereafter issued) is to take effect from the date of the receipt, there was a present contract of insurance to be superseded by the policy or terminated by rejection of the application, although the application upon a printed form recited that the insurance was not to take effect until the policy was accepted; hence the company would be liable where the application was accepted in ignorance of an intervening accident which resulted in death before the delivery of the policy.

INSURANCE—AGENTS—AUTHORITY. Want of authority of a soliciting agent, who received the first premium on a life insurance policy, to issue a binding receipt constituting a present contract of insurance, must be brought home to the insured in order to relieve the insurance company from liability, the general rules of agency not applying.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered November 16, 1904, in favor of the defendant, upon granting a nonsuit at the close of plaintiff's case, in an action on a policy of life insurance. Reversed.

Hartson & Holloway, Bedford Brown, and *J. D. Campbell*, for appellant, contended, among other things, that the preliminary contract remained in force until superseded by the issuance of a regular policy or rejection of the application. 16 Am. & Eng. Ency. Law (2d ed.), 851, 852; *Cooper v. Pacific Mutual Ins. Co.*, 7 Nev. 116, 8 Am. Rep. 705; *Halle v. New York Life Ins. Co.*, 22 Ky. Law 740, 58 S. W. 822. The agent had authority to make the contract. *Perkins*

[1] Reported in 83 Pac. 116.

v. Washington Ins. Co., 4 Cowen 645; *Insurance Co. v. Wilkinson,* 13 Wall. 222, 20 L. Ed. 617. The agent of a general agent can do what his superior could do. *Palm v. Medina County etc. Ins Co.,* 20 Ohio 529; *Krumm v. Jefferson Fire Ins. Co.,* 40 Ohio St. 225; *Hardwick v. State Ins. Co.,* 20 Ore. 547, 26 Pac. 840; *Nixon v. Travelers' Ins. Co.,* 25 Wash. 254, 65 Pac. 195.

Hughes, McMicken, Dovell & Ramsey, for respondent, contended, *inter alia,* that the rights of the parties became fixed by the death of Starr. *Stringham v. Mutual Life Ins. Co.,* 44 Ore. 447, 75 Pac. 822; *Giddings v. Insurance Co.,* 102 U. S. 108, 26 L. Ed. 92; *Thompson v. Travelers' Ins. Co.,* 11 N. D. 274, 91 N. W. 75. Under the application, there was no contract until formal acceptance at the home office. *Insurance Co. v. Young's Adm'r,* 90 U. S. 106, 23 L. Ed. 152; *Pace v. Provident Sav. etc. Soc.,* 113 Fed. 13; *Steinle v. New York Life Ins. Co.,* 81 Fed. 489; *Kohen v. Mutual Reserve Fund Life Ass'n,* 28 Fed. 705; *Misselhorn v. Mutual Reserve Fund Life Ass'n,* 30 Fed. 545; *Marks v. Hope Mutual Life Ins. Co.,* 117 Mass. 528; *Markey v. Mutual Benefit etc. Ins. Co.,* 118 Mass. 178; *Allen v. Massachusetts etc. Acc. Ass'n,* 167 Mass. 18, 44 N. E. 1053; *Cable v. United States Life Ins. Co.,* 111 Fed. 19. The statements of good health constitute a warranty; there can be no insurance on the life of a man already dead. *Schwartz v. Germania Life Ins. Co.,* 18 Minn. 448; *Coker v. Atlas Acc. Ins. Co.* (Tex. Civ. App.), 31 S. W. 703; *Jacobs v. New York Life Ins. Co.,* 71 Miss. 656, 15 South. 639; *Shattuck v. Mutual Life Ins. Co.,* 4 Clifford 598. There could be no contract until acceptance of the proposal. *Covenant Mutual etc. Ass'n v. Conway,* 10 Brad. (Ill. App.) 348; *Ross v. New York Life Ins. Co.,* 124 N. C. 395, 32 S. E. 733; *Oliver v. Mutual Life Ins. Co.,* 97 Va. 134, 33 S. E. 536; *Newcomb v. Provident Fund Soc.,* 5 Colo. App. 140, 38 Pac. 61; *New York Life Ins. Co. v. Babcock,* 104 Ga. 67, 30 S. E. 273;

McClave v. Mutual etc. Life Ass'n, 55 N. J. L. 187, 26 Atl. 78.

RUDKIN, J.—On November 30, 1903, at Spokane, Washington, Martin Luther Starr made application to the defendant insurance company, through one of its soliciting agents, for insurance on his life in the sum of $2,000. The application, which was on a printed form furnished by the company, contained the following provisions:

"This application is the basis and part of a proposed contract for insurance which shall not take effect until the first premium shall have been paid during my continuance in good health, and the policy shall have been signed by the secretary of the company and issued."

Also:

"I have paid $.... to the subscribing soliciting agent, who has furnished me with a binding receipt therefor, signed by the secretary of the company, making the insurance in force from this date, provided this application shall be approved and the policy duly signed by the secretary at the head office of the company and issued."

On the same day Starr was examined by a physician designated by the insurance company, and thereupon the soliciting agent issued to him the following receipt:

"Nov. 30, 1903.

"Received of Martin Luther Starr, five and no 100 dollars to apply on life policy for $2,000 in Mutual Life Ins. Co. of New York. Also his note to be paid to said Company Jan. 30th, 1903, for $76.22, bal. on first half of semi-annual premium. Policy to take effect from date. J. W. Pantall, For Mutual Life Ins. Co. of N. Y."

The application was forwarded to the head office of the company in New York, through its Seattle office, and on the afternoon of December 8, 1903, the application was approved and a policy issued. The policy was returned to the Seattle office for delivery to the insured. Starr died on the morning of December 8, before the approval of the appli-

cation and the issuance of the policy of insurance, from injuries received two days before, and the agent of the defendant company refused to deliver the policy for that reason. This action was prosecuted by Starr's widow to recover the amount of the insurance. The court below held, on the foregoing facts, that there was no contract of insurance, and granted a nonsuit. From the judgment of nonsuit, this appeal is prosecuted.

The appellant contends that the above receipt constituted a preliminary contract of insurance, which remained in force until the application was either approved or rejected at the home office of the company. The respondent, on the other hand, contends that the receipt and the application must be construed together; that the approval of the company was a prerequisite to the consummation of the contract of insurance; and that the approval of the application and the issuance of the policy, after the death of the insured and without knowledge thereof, was of no effect. With this latter contention, we fully agree. By the death of Starr the subject-matter of the contract of insurance ceased to exist, and at that moment there was a contract of insurance or there was none. The approval or rejection of the application after that time would be ineffectual for any purpose.

The object of the second provision of the application, above quoted, is not entirely clear, especially from the standpoint of the insured. If there was to be no contract of insurance in any event until the application was approved at the home office and a policy issued thereon, it would seem entirely immaterial to the insured whether the contract related back to the date of the application or not. If he lived until the application was approved and a policy issued, it would seem a matter of indifference to him whether he had been insured during the interim between the date of the application and the date of the issuance of the policy. On the other hand, if he died before the application was approved and the policy issued, his beneficiaries would derive no benefit from the in-

surance. The chief object of the provision would therefore seem to be to enable the insurance company to collect premiums for a period during which there was in fact no insurance, and consequently no risk.

However, this may be, if the receipt issued to the insured contained the same provision as the application, viz., that the insurance would take effect from that date, provided the application was approved at the home office and a policy issued, we would feel constrained to give full effect to the contract of the parties, and hold that there was no contract of insurance, unless the application was approved and a policy issued during the life time of the insured. Such was the case of *Steinle v. New York Life Ins. Co.*, 81 Fed. 489, cited by the respondent. *Pace v. Provident Sav. Life Assur. Soc.*, 113 Fed. 13, is so briefly reported that the facts do not appear.

While the application and the receipt form a part of the same transaction, and must be construed together, yet, where there is a conflict between the two, the court must of necessity determine which will control. The application in this case is on a printed form, with blanks not even filled, while the receipt given is wholly in writing. If there is a conflict between the two, under such circumstances, the latter will control. *Cole v. Union Cent. Life Ins. Co.*, 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201. Adopting and applying this rule of construction, which is approved by the authorities, we have no doubt that it was the intention of the parties to effect a present contract of insurance, binding from the date of the receipt, which would be superseded by the policy when issued, or terminated by a rejection of the application and notice to the insured. We think that no other construction will give effect to the manifest intention of the parties.

There was evidence tending to show that the soliciting agent had no authority to enter into a contract such as is contended for by the appellant, but this fact does not seem to be relied on by the respondent. "The powers of the agent

are, *prima facie,* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals;" (*Insurance Company v. Wilkinson,* 13 Wall. 222, 20 L. Ed. 617) and the general rules of agency do not apply in such cases. *Hart v. Niagara Fire Ins. Co.,* 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86. See, also, Bacon's Benefit Soc. & Life Ins. (3d ed.), § 153. If insurance companies deem it necessary for their protection to limit the operation of their contracts of insurance from the date of issuance of the policy, or from any other date, it is very easy for them to say so, and to bring knowledge of that fact home to those with whom they are dealing. In this case, we hold that the receipt given constituted a present contract of insurance, subject to be continued or terminated by the approval or rejection of the application, and that the insured was not affected by any want of authority in the soliciting agent to enter into such a contract, unless notice of such want of authority was brought home to him.

The judgment is reversed, with directions to vacate the judgment of nonsuit, and for further proceedings not inconsistent with this opinion.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

[No. 5665. Decided December 28, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. ALFRED BERGFELDT, *Appellant*.[1]

INDICTMENT—SUNDAY—JUDICIAL NOTICE. An information charging the defendant with carrying on the business of barbering on Sunday on a day named, which in fact was Sunday, shows with sufficient certainty that the offense was committed on Sunday, since the court will take judicial notice of the day.

STATUTES—AMENDMENT—TITLE—SUFFICIENCY. Const., art. 2, § 37, providing that an act shall not be reversed or amended by mere reference to its title but that the act reviewed must be set forth in full, has no application to the implied repeal of a former law by another on the same subject which is a complete law in itself without mention of the former act.

CONSTITUTIONAL LAW—SPECIAL LEGISLATION—PROHIBITING BARBERING ON SUNDAY—VALIDITY OF STATUTE. Laws 1903, p. 68, prohibiting the business of barbering on Sunday, does not violate the constitutional prohibitions against class legislation or special privileges, nor the Federal constitutional prohibitions against abridging the privileges of a citizen or the taking of liberty or property without due process of law, even as to those who conscientiously believe in the observance of the seventh day of the week (RUDKIN, J., dissenting).

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered October 12, 1904, upon stipulated facts, adjudging the defendant guilty of the offense of carrying on the business of barbering on Sunday. Affirmed.

James F. O'Brien (T. L. Stiles, of counsel), for appellant, contended, *inter alia,* that the act is class legislation. *State v. Brown*, 37 Wash. 97, 79 Pac. 635; *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *In re Aubrey*, 36 Wash. 308, 78 Pac. 900; Brannon, Fourteenth Amendment, p. 200; *Bessette v. People*, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; State and Federal Control, pp. 13 *et seq.* and 482; Tiedeman, Lim. Police Power, pp. 194 *et seq.* and

[1]Reported in 83 Pac. 177.

277-281; Cooley, Torts, p. 277; *People ex rel. Fleischman v. Caldwell,* 168 N. Y. 671, 61 N. E. 1132; *In re Sing Lee,* 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; Black, Const. Law (2d ed.), 471. It deprives the citizen of his liberty and property without due process of law. 1 Blackstone, Commentaries, 138; *Butchers' Union etc. Co. v. Crescent City Live-Stock etc. Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *In re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *Clinton v. Phillips,* 58 Ill. 102, 11 Am. Rep. 52; *State v. Julow,* 129 Mo. 163, 31 S. W. 781, 50 Am. St. 443; *Millet v. People,* 117 Ill. 294, 7 N. E. 631, 57 Am. Rep. 869; *Wally's Heirs v. Kennedy,* 2 Yerg. 554, 24 Am. Dec. 511; *People v. Marx,* 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Kuhn v. Common Council,* 70 Mich. 534, 38 N. W. 470; *Shreveport v. Levy,* 26 La. Ann. 671, 21 Am. Rep. 553; *Ragio v. State,* 86 Tenn. 272, 6 S. W. 401; Sutherland, Statutory Const., §§ 121-127; *Ex Parte Westerfield,* 55 Cal. 550, 36 Am. Rep. 47; *Dennis v. Moses,* 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; *Ex Parte Jentzsch,* 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. It is unconstitutional to pass a law of this kind including within its provisions those who conscientiously observe the seventh day. *Johns v. The State,* 78 Ind. 332, 41 Am. Rep. 577; *Cincinnati v. Rice,* 15 Ohio 225; *Canton v. Nist,* 9 Ohio St. 439; *People v. Bellett,* 99 Mich. 151, 57 N. W. 1094; Cooley, Const. Lim. (5th ed.), 587, 588; Cooley, Const. Lim. (1st ed.), 476, 477.

Charles O. Bates and *Walter M. Harvey,* for respondent, contended, among other things, that the enactment of the law was within the discretion of the legislature as a health measure. *State v. Nichols,* 28 Wash. 628, 69 Pac. 372; *People v. Havnor,* 149 N. Y. 195, 43 N. E. 541, 52 Am. St. 707, 31 L. R. A. 689; *People v. Bellett,* 99 Mich. 151, 57 N. W. 1094, 41 Am. St. 589, 22 L. R. A. 696; *State v. Petit,* 74

Minn. 376, 77 N. W. 225; *Petit v. Minnesota,* 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716; *People ex rel. Hobach v. Buttling,* 13 Misc. Rep. 587, 35 N. Y. Supp. 19; *State v. Frederick,* 45 Ark. 347, 55 Am. Rep. 555; *Commonwealth v. Waldman,* 140 Pa. St. 89, 21 Atl. 248, 11 L. R. A. 563; *Commonwealth v. Williams,* 1 Pearson (Pa.) 61; *Commonwealth v. Dextra,* 143 Mass. 28, 8 N. E. 756. The Sunday closing laws apply to Seventh Day Adventists. *Scoles v. State* (Ark.), 1 S. W. 769; *Commonwealth v. Has,* 122 Mass. 40; Cooley, Const. Lim., pp. 476-477; Desty, Criminal Law, § 117 and cases cited; *Parker v. State,* 16 Lea 476, 1 S. W. 202; *Frolickstein v. Mayor of Mobile,* 40 Ala. 725; *Gabel v. Houston,* 29 Tex. 335; *Swann v. Swann,* 21 Fed. 299; *Spect v. Commonwealth,* 8 Pa. St. 312, 49 Am. Dec. 518; *Ex parte Andrews,* 18 Cal. 678; 24 Am. & Eng. Ency. Law (1st ed.), 546.

Frederic G. Dorety and *Oliver F. Cutts,* as *amici curiae.* Where persons or acts belonging to a single occupation only are to be subjected to restraint, that occupation must be shown to be more likely than others to produce the danger at which the law is aimed, or else that class of persons must be shown to be more in need of the protection which the law offers. Cooley, Const. Lim. (5th ed.), 486; Freund, Police Power, p. 755, § 738; *Connolly v. Union Sewer Pipe Co.,* 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. 539; *Gulf etc. R. Co. v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *State v. Loomis,* 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Frorer v. People,* 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Low v. Rees Printing Co.,* 41 Neb. 127, 59 N. W. 362, 43 Am. St. 670, 24 L. R. A. 702; *Braceville Coal Co. v. People,* 147 Ill. 66, 35 N. E. 62, 37 Am. St. 206, 22 L. R. A. 340; *Hocking Valley Coal Co. v. Rosser,* 53 Ohio St. 12, 41 N. E. 263, 53 Am. St. 622, 29 L. R. A. 386; *South etc. R. Co. v. Morris,* 65 Ala. 193; *Dixon v. Poe,* 159 Ind. 492, 65

N. E. 518, 95 Am. St. 309, 60 L. R. A. 308; *Ruhstrat v. People,* 185 Ill. 133, 57 N. E. 41, 76 Am. St. 30, 49 L. R. A. 181; *State v. Haun,* 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369; *In re Eight-Hour Bill,* 21 Colo. 29, 39 Pac. 328; *State ex rel. Randolph* v. *Wood,* 49 N. J. L. 85, 7 Atl. 286. The real object and effect of the law is to accomplish some other and illegitimate end, under cover of a health regulation. *In re Aubrey,* 36 Wash. 308, 78 Pac. 900; *In re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *Chicago v. Netcher,* 183 Ill. 104, 55 N. E. 707, 75 Am. St. 93, 48 L. R. A. 261. The following are exactly similar cases in point. *Tacoma v. Krech,* 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68; *Ex Parte Jentzsch,* 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *Eden v. People,* 161 Ill. 296, 43 N. E. 1108, 52 Am. St. 365, 32 L. R. A. 659; *State v. Granneman,* 132 Mo. 326, 33 S. W. 784; *Ragio v. State,* 86 Tenn. 272, 6 S. W. 401; see, also, *Ex Parte Westerfield,* 55 Cal. 550, 36 Am. Rep. 47.

Per Curiam.—The defendant was informed against for the crime of carrying on the business of barbering on Sunday, in violation of the act of March 7th, 1903, Laws 1903, p. 68. A demurrer interposed to the information was overruled. Thereafter the case was submitted to the court on an agreed statement of facts. The agreed statement admitted facts constituting a violation of the act, and set forth, by way of defense, that the defendant is a Seventh-Day Adventist, and conscientiously observes the seventh day of the week, commonly called Saturday, and performs no labor of any kind on that day; that he believes the right is guaranteed him to work six days of the week, and to refrain from work on the seventh; that he further believes that it is impossible for him to make a living in his business without keeping his place of business open six days of the week. The court adjudged the defendant guilty, and from the judgment and sentence pronounced against him, this appeal was taken.

The only ground of demurrer, aside from the question of

the validity of the statute, is that it does not sufficiently appear from the information that the acts complained of were committed on Sunday. The information recites that the appellant is accused of the crime of carrying on the business of barbering on Sunday, and charges that, on the 10th day of April, 1904, the appellant unlawfully carried on the business of barbering on Sunday. While the information does not charge, in direct terms, that the 10th day of April, 1904, was Sunday, yet the court will take judicial notice of that fact, and this coupled with the further allegation that the appellant carried on the business of barbering on Sunday on that day, shows with sufficient certainty that the acts complained of were committed on Sunday.

The first objection urged against the validity of the statute under which the information was filed is that the act is amendatory of Bal. Code, § 7251, and that the object of the act is not set forth in the title, and the act as amended is not set forth at full length as required by our constitution. This question was decided adversely to the appellant in *In re Dietrick,* 32 Wash. 471, 73 Pac. 506.

The next contention is that the act violates section 12 of art. 1, of the state constitution, which provides that "No law shall be passed granting any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens and corporations;" and section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that, "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It is further contended that the act is unconstitutional as to those who conscientiously believe in the observance of the seventh day of the week.

The power of the legislature to enact a general law pro-

hibiting all labor on Sunday, excepting works of charity or necessity, is now conceded on every hand. It is likewise conceded that such regulations are civil in character, and apply to all persons within the state—to those who believe in the observance of the first day of the week, or the seventh day of the week, as a religious duty, and to those who believe in no religious observance whatever. These propositions are so well settled that it requires no citation of authorities to sustain them. 27 Am. & Eng. Ency. Law (2d ed.), 390, 391. There is, however, a sharp conflict of authority as to the power of the legislature to enact a law prohibiting the carrying on of a particular occupation, such as barbering, on Sunday. Such laws have been sustained by the courts of New York, Michigan, and Oregon. *People v. Havnor,* 149 N. Y. 195, 43 N. E. 541, 52 Am. St. 707, 31 L. R. A. 689; *People v. Bellett,* 99 Mich. 151, 57 N. W. 1094, 41 Am. St. 589, 22 L. R. A. 696; *Ex parte Northrup,* 41 Ore. 489, 69 Pac. 445. On the other hand, their validity has been denied in Illinois, California, and Missouri. *Eden v. People,* 161 Ill. 296, 43 N. E. 1108, 52 Am. St. 365, 32 L. R. A. 659; *Ex parte Jentzsch,* 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664; *State v. Granneman,* 132 Mo. 326, 33 S. W. 784.

The arguments in favor of and against the validity of such statutes are fully set forth in the decisions referred to and will not be repeated here. *Petit v. Minnesota,* 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716, is also cited in support of such laws. The law of Minnesota involved in that case prohibited all Sunday labor, excepting works of necessity or charity, and provided that Sunday barbering should not be deemed a work of necessity or charity. The supreme court of the United States held first, that the proviso took nothing from the statute, as barbering was not a work of necessity or charity; and second, that the classification was not so palpably arbitrary as to bring the law in conflict with the constitution of the United States.

The question has been twice before this court, first, in the

case of *Tacoma v. Krech,* 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68, where an ordinance prohibiting barbers from pursuing their ordinary calling on Sunday was declared unconstitutional, following the cases above cited from Illinois, California and Missouri; and second, in *State v. Nichols,* 28 Wash. 628, 69 Pac. 372, a prosecution for the violation of the Sunday closing law, found in Bal. Code, § 7152. In the case last cited, the case of *Tacoma v. Krech* was declared overruled. It was contended in argument before this court that *State v. Nichols* was based on a different statute, and that the point decided in *Tacoma v. Krech* was not involved. However that may be, a majority of the court is now of opinion that the act in question is constitutional, and that *Tacoma v. Krech* was properly overruled. This leads to an affirmance of the judgment.

Judge Rudkin does not concur in this conclusion. He thinks the act in question, without right and without reason, denies to an inconsiderable portion of our population the right to pursue their ordinary calling on Sunday, while that privilege or immunity is enjoyed by every other laborer and artisan in the state; that while, in a technical sense, the act applies to all persons within the state, yet in its practical operation, it affects barbers alone, and denies to them that equality before the law which our constitutions were established to maintain. He does not consider these views in conflict with *Petit v. Minnesota, supra,* as no such discrimination appeared there.

[No. 5826. Decided December 28, 1905.]

THE STATE OF WASHINGTON, *Respondent*, v. MATTEO ROMANO, *Appellant*.[1]

CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—PRESUMPTIONS—INSTRUCTIONS. Upon a prosecution for assault with intent to murder under an information charging, also, assault with a deadly weapon with intent to do bodily harm no considerable provocation appearing therefor, it is proper in speaking of the latter intent, to instruct the jury that every sane person is presumed to intend the natural consequences of his voluntary act, although death did not ensue; since the same must be held to apply to the lesser offense only.

SAME—CHARGE OF ASSAULT WITH RAZOR—EVIDENCE OF SHOOTING—ADMISSIBILITY. Under an information charging an assault with intent to murder with a deadly weapon, viz., a razor, it is proper to receive in evidence a shotgun with an empty shell found in the room of the accused, where it appears that the prosecuting witness was attacked by an unknown person who cut his throat and shot him in the back with a shotgun, the shot corresponding in size with those that had been contained in the empty shell.

SAME—EVIDENCE OF IDENTITY—SUFFICIENCY. There is sufficient evidence of identity to sustain a conviction of assault with intent to do bodily harm, where it appears that the victim was cut and shot by an unidentified person, that the accused admitted to two persons that he made the assault, and a shotgun with an empty shell, that had contained shot of the same size used in the attack, was found in the room of the accused after his arrest.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 7, 1904, upon a trial and conviction of the crime of assault with intent to commit murder. Affirmed.

William C. Keith (E. F. Kienstra, of counsel), for appellant.

Kenneth Mackintosh and *Hermon W. Craven (William D. Totten,* of counsel), for respondent.

[1]Reported in 83 Pac. 1.

Crow, J.—Appellant Matteo Romano was convicted, in the superior court of King county, of the crime of assault with intent to commit murder, and has appealed to this court.

About two o'clock on the morning of March 19, 1904, while Sebastian Ucci, the prosecuting witness, was asleep in his room, in the city of Seattle, some unknown person made an attack upon him, with a sharp instrument, cutting his throat, and immediately thereafter shot him in the back. He did not see, nor was he able to identify, his assailant. On May 12, 1904, appellant was arrested and charged with said crime. The evidence shows that, prior to his arrest, in conversations with Mrs. Sebastian Ucci, the divorced wife, and Mrs. Concheta Rosetta, the daughter of said Sebastian Ucci, appellant admitted he had made said assault. Two days after his arrest, the police officers found a shotgun and empty shell in his room, which were admitted as evidence. Fifty or sixty shot taken from Ucci's wound, of the size of those that had been contained in the empty shell, were also admitted as evidence. Officer Adams, who arrested appellant, testified that, while appellant was on the way to prison, he said to John Rosetta, husband of Concheta Rosetta, "I will cut your throat if I get out of this. I may get a year but I will cut your throat," and that he also made angry statements to said Rosetta in the Italian language which Adams could not understand.

From the testimony of appellant, it appears that he claims to have sustained criminal relations with said Concheta Rosetta, for a considerable period of time prior to his arrest; also, that much bitterness and animosity existed between him and said John Rosetta. He evidently regarded John Rosetta and his wife as being responsible for his arrest. John Rosetta testified that, while appellant was in the custody of officer Adams, he, speaking in the Italian language, said "I may get two or three years, but when I get back I will do the same to you as I did to your father-in-law." Mrs. Sebastian Ucci, divorced wife of the prosecuting witness, testi-

fied to the admission made to her by appellant; and Mrs. Concheta Rosetta, daughter of the prosecuting witness, testified that about a month previous to his arrest appellant had told her that, if she did not leave her husband and live with him, he would do the same to her as he had to her father, and that he had cut and shot her father. It appears that on the day of his arrest appellant was expected to call at the house of Concheta Rosetta, and that she, being fearful of an assault, caused officer Adams to be notified, who, as the result of such notice, was present and arrested appellant when he arrived, at which time appellant was heavily armed.

Appellant has made three assignments of error: First, that the court erred in giving the following as a portion of one of the instructions to the jury: "And I further charge you that every sane person is presumed to intend the natural and ordinary consequences of his voluntary act;" second, that the court should have set aside the verdict and granted a new trial, for the reason that the information does not charge appellant with shooting the prosecuting witness, and that the court therefore erred in admitting the shotgun in evidence; third, that the court erred in refusing to set aside the verdict for insufficiency of evidence as to the identity of the person who made the assault.

Appellant evidently bases his main reliance for a reversal upon his exception to the charge of the court on the question of intent, citing the case of *State v. Dolan,* 17 Wash. 499, 50 Pac. 472, and in his opening brief says:

"The prosecuting witness was not murdered, and the above instruction as applied to the facts of this case, left the jury to understand that, as death might have resulted as the natural consequence of the assault, the law presumes that he intended that such consequences should follow. If death had resulted from the act, the instructions would have been applicable, but this court has held that such an instruction is inapplicable in the case of assault where death did not result, and that the intent to murder must be established as any other fact."

Before discussing the instructions in *State v. Dolan, supra,* or those in the case at bar, we call attention to a material variance of the information in the *Dolan* case from the one upon which appellant has been prosecuted. In *State v. Ackles,* 8 Wash. 462, 36 Pac. 597, this court held that, on the information then under consideration, which charged that the defendant "did unlawfully, purposely and of his premeditated malice, and with intent to murder, assault and shoot one Benjamin Franklin with a deadly weapon, . . . with intent to murder the said Benjamin Franklin," said defendant could not be convicted of the crime of making an assault with a deadly weapon with intent to do bodily harm, for the reason that the latter crime was not included in the information. Anders, J., there speaking for this court, said:

"While it is true that the jury may find a defendant not guilty of the crime charged, but guilty of an offense of lesser degree, or of an offense necessarily included within that charged, it is also true that 'accusation must precede conviction,' and that no one can legally be convicted of an offense not properly alleged. The accused, in criminal prosecutions, has a constitutional right to be apprised of the nature and cause of the accusation against him. Const., art. 1, § 22. And this can only be made known by setting forth in the indictment or information every fact constituting an element of the offense charged. This doctrine is elementary and of universal application, and is founded on the plainest principle of justice. Tested by this rule we think the verdict and judgment in this case were erroneous, and must be set aside. Under our statute, an assault with a deadly weapon with intent to inflict upon the person of another a bodily injury is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a wilful, malignant and abandoned heart."

The information in *State v. Ackles, supra,* which is set forth at page 463 of the opinion, discloses an utter absence of any allegation that the assault was without any considerable provocation, or that it was the impulse of a wilful,

abandoned or malignant heart. Bal. Code, § 7058. This court, therefore, reversed the final judgment entered on a verdict finding the defendant guilty of the lesser crime of an assault with a deadly weapon with intent to do bodily harm. In *State v. Young,* 22 Wash. 273, 60 Pac. 650, the defendant was prosecuted upon an information charging him with the crime of making an assault upon the prosecuting witness with a deadly weapon with intent to kill and murder said prosecuting witness. But an examination of the information, which appears in the opinion, will show that, by reason of the use of the words, "with the intent aforesaid, no considerable provocation appearing therefor," it was sufficient to sustain a conviction of the lesser crime of assault with intent to do bodily harm. The trial court, however, refused to instruct the jury that they could find the defendant guilty of such lesser crime, and this court, speaking through Dunbar, J., held such refusal to be prejudicial error, saying:

"The refusal of the court to give this instruction is alleged here as error. We think it was error, and prejudicial to the defendant. It is true that in *State v. Ackles,* 8 Wash. 462 (36 Pac. 597), we held that, under the information in that case, it was not competent for the jury to return a verdict of guilty of assault with a deadly weapon with intent to do bodily harm, but for the reason that the lesser crime was not described in the information; there being no allegation that the assault was without considerable provocation, or that it was the impulse of a wilful, abandoned, or malignant heart. . . . Under our statute (Bal. Code, § 7058), an assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, is made a felony only upon the express condition that the assault is without considerable provocation, or where the circumstances of the assault show a wilful, malignant, and abandoned heart; and, when an act is punishable in a particular manner under certain conditions, these conditions must be set forth so as to show that the act is punishable. But the information in this case meets all the objections urged by the court in the case cited. It is alleged that the assault was made, in the manner and form stated, no considerable provocation appearing therefor; and

as the statute is in the alternative, so far as the conditions mentioned (viz., no considerable provocation appearing, or that it was the impulse of a wilful, abandoned, and malignant heart) are concerned, the statement of the existence of either was sufficient."

By these decisions, the law of this state is well settled to the effect that, where an information charging a defendant with making an assault with a deadly weapon with intent to commit the crime of murder is not so drawn as to include the lesser crime of assault with intent to do bodily harm, a conviction of the latter crime cannot be permitted; but, where it is so drawn, it would be error for the trial court to refuse to instruct the jury that the defendant might be convicted of such lesser crime.

The information in *State v. Dolan, supra,* which we find in the record, was not so drawn as to authorize a conviction of the lesser crime of assault with intent to do bodily harm, but corresponds to the information in *State v. Ackles, supra.* It therefore followed that the only crime as to which the court was authorized to instruct the jury was the one therein charged, to wit: assault with intent to commit murder. In this case the information, omitting formal parts, is in the following language:

"Matteo Romano is hereby accused by W. T. Scott, the prosecuting attorney in and for the county of King, state of Washington, in the name of and by the authority of said state of Washington, and on oath by this information, of the crime of assault with intent to commit the crime of murder, committed as follows, to wit: He, the said Matteo Romano, in the county of King, state of Washington, on the 19th day of March, 1904, wilfully, unlawfully, feloniously, purposely, maliciously, and with intent to kill and murder one Sebastian Ucci, an assault did make in and upon the person of the said Sebastian Ucci with a deadly weapon, to wit, a razor, then and there had and held in the hands of the said Matteo Romano, with which he then and there wilfully, unlawfully, feloniously, purposely and maliciously struck at, cut and wounded the person of the said Sebastian Ucci, with the in-

tent aforesaid, no considerable provocation appearing therefor."

It will be seen that this information is almost identical with that in the case of *State v. Young, supra;* hence, it here became the duty of the trial court to charge the jury, not only as to all necessary facts which must be proven to authorize a conviction of the crime of assault with intent to commit murder, but also as to all facts necessary to be proven to warrant a conviction of the crime of assault with intent to do great bodily harm. The trial court first charged the jury as follows:

"Under this information, it is possible, should the evidence under my instructions justify it, that the defendant be convicted of any of three separate offenses: they are, (1) assault with a deadly weapon with intent to commit the crime of murder; (2) assault with a deadly weapon with intent to do bodily harm; (3) assault and battery."

After giving this charge, the court proceeded to define the different grades of crime above mentioned and, also, to state the facts necessary to be proven to authorize a conviction in each instance. Thereafter the following instructions, which we will number for the convenience of reference, were given:

"(1) The defendant in this case being charged with cutting and wounding one Sebastian Ucci with intent to kill and murder the said Sebastian Ucci, before the defendant can be convicted as charged in the information, it is necessary that you be satisfied by the evidence beyond a reasonable doubt not only that the defendant did cut and wound said Sebastian Ucci, but that in so doing he intended to kill and murder said Ucci. This intent is as essential an element of the crime as is the act itself, and must be found by the jury as a matter of fact before a conviction can be had of the crime charged in the information.

"(2) If you find from the evidence that the defendant cut and wounded said Sebastian Ucci, and intended to cut and wound him, but are not satisfied that in so doing he intended to kill the said Ucci, you cannot find the defendant guilty as charged in the information. An intent to wound is not sufficient.

"(3) I charge you that, in order to prove the crime of assault with intent to commit the crime of murder in this case, it is necessary for the state to prove beyond a reasonable doubt that the defendant, at the time and place, and in the manner and form charged in the information, cut Sebastian Ucci with a razor or other sharp instrument purposely and maliciously, intending to take his life; and that in order to prove the crime of assault with a deadly weapon with intent to inflict bodily injury in this case it is necessary for the state to prove beyond a reasonable doubt that at the time and place mentioned in the information, the defendant purposely and unlawfully cut Sebastian Ucci with a knife or other sharp instrument, without any considerable provocation, with the intention of inflicting great bodily injury upon the person of said Sebastian Ucci. But I charge you that such intent need not be proved by direct and positive testimony, but may be inferred by the jury from the facts and circumstances presented as evidence in this case, provided they are sufficient to satisfy you beyond a reasonable doubt of the existence of such intent; *and I further charge you that every sane person is presumed to intend the natural and ordinary consequences of his voluntary act.*"

In the above quotation we have italicized the language to which the appellant has taken exception, and upon which he assigns his first error. It is contended by respondent that the exceptions taken by appellant are not sufficient to justify any consideration of said assignment by this court. We have some doubt as to their sufficiency, but will nevertheless consider the assignment on its merits. If the only crime of which the appellant could be convicted, under the information herein, was that of assault with intent to murder, the language objected to would have no place in the instruction, and under the authority of *State v. Dolan, supra,* might possibly be prejudicial error. It is conceded by the appellant that this language or instruction on the question of intent is not erroneous or prejudicial when applied to the crime of assault with intent to do great bodily harm, but as to that crime states the law.

Our view of the entire body of the instructions is that,

upon the different degrees of crime involved in the information, the several instructions given were proper. It will be noticed that instructions 1 and 2 above quoted are almost identical with the first and third instructions which were asked of, and refused by, the trial court in *State v. Dolan, supra,* shown at pages 510 and 511 of the opinion, and which were approved by this court as proper under an information charging only the crime of assault with intent to commit murder. These instructions were given by the trial court at the request of appellant and correctly stated the law of intent as applied to the crime of assault with intent to murder. In addition to giving this charge, it also became the duty of the trial court to instruct the jury, under the information here, on the law of intent as applied to the crime of assault with intent to do bodily harm, and our understanding of the language excepted to by the appellant is that it refers to the latter crime only.

Appellant, however, contends that because the court gave the instructions 1 and 2 as requested by him, and also gave that to which he has excepted, the entire body of instructions as given became inconsistent, and necessarily tended to mislead and confuse the jury. We cannot agree with this contention, as to do so would be to hold that, under an information such as the one at bar, the trial court could instruct only on the question of intent as applied to the charge of assault with intent to murder. But if this was done and no proper instruction was given on the lesser crime, the action of the court would be error under the authority of *State v. Young, supra.* Considering all the instructions in the light of the information upon which the appellant was prosecuted, we are unable to find any prejudicial error.

By his second assignment of error, the appellant in substance contends that, as he was not charged with shooting the prosecuting witness, the court erred in admitting in evidence the shotgun which was found in his room two days after his arrest. In view of statements made by appellant to the vari-

ous witnesses, as above narrated, and the evidence of the physician who attended the prosecuting witness, showing and identifying the shot and other articles taken from the wound, and as the prosecuting witness was actually shot by the person who cut his throat, we think this evidence was proper.

The last contention made by appellant is that the court committed prejudicial error in refusing to set aside the verdict for insufficiency of evidence to identify appellant as the person who committed the crime. An examination of the statement of facts shows this assignment to be absolutely without merit. The verdict is sustained by the evidence. The judgment is affirmed.

MOUNT, C. J., DUNBAR, FULLERTON, and HADLEY, JJ., concur.

RUDKIN, J. (concurring)—By the same information the appellant was charged with the commission of two felonies; first, an assault with intent to murder, and, second, an assault with a deadly weapon with intent to inflict a bodily injury where no considerable provocation appeared. The court charged the jury in general terms that the intent was an essential element of the crime charged, and must be proved as a fact; that it might be proved by circumstantial as well as by direct evidence, and that *every sane person is presumed to intend the natural and ordinary consequences of his voluntary act.* The majority holds that the italicized portion of the charge referred only to the charge of an assault with intent to inflict a bodily injury, and that the charge is correct as applied to that crime, thus distinguishing this case from the case of *State v. Dolan,* 17 Wash. 499, 50 Pac. 472, cited in the majority opinion.

I confess I am at a loss to know how the jury could understand that the above general statement of an abstract proposition of law applied to the question of intent involved in the commission of one felony, but not in the other. I am at a still greater loss to know why the charge is correct as applied

to one felony but not as to the other. If a sane man does not intend the natural and probable consequences of his voluntary act, when charged with an assault with intent to murder, because murder does not ensue, it would seem inevitably to follow that a person charged with an assault with intent to inflict a bodily injury does not intend the natural and probable consequences of his voluntary act unless bodily injury ensues, and it would be manifest error for the court to assume in its charge to the jury that bodily injury did, in fact, ensue. I concur in the judgment of affirmance because I think the portion of the charge excepted to is a correct statement of a familiar proposition of law, and is applicable in every case where the question of intent is involved. In charging the jury in *Commonwealth v. Webster,* 5 Cush. 295, Shaw, C. J., said:

"This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the natural, probable, and usual consequences of his own acts."

The supreme court of the United States, in commenting on an instruction in *Allen v. United States,* 164 U. S. 492, 17 Sup. Ct. 154, 41 L. Ed. 528, says:

"This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenleaf on Evidence, § 18; *Regina v. Jones,* 9 C. & P. 258; *Regina v. Hill,* 8 C. & P. 274; *Regina v. Beard,* 8 C. & P. 143; *People v. Herrick,* 13 Wend. 87, 91."

Greenleaf says, in the section cited:

"Thus, also, a sane man is conclusively presumed to contemplate the natural and probable consequences of his own acts; and therefore the intent to murder is conclusively inferred from the deliberate use of a deadly weapon."

Why should the application of this familiar principle depend on something that transpires long after the commission of the crime? I cast two men overboard in mid-ocean. The

one succumbs; the other is rescued. I am prosecuted for the murder of the one, and intend the natural consequences of my act; but in the prosecution for an assault with intent to murder the other, I do not intend the natural and probable consequences of my act, because, forsooth, he was rescued through no agency of mine. I shoot recklessly into a crowd and, by the same act, kill one person and dangerously wound another. I intend the natural consequences of my act as to the one, but not as to the other. Let us suppose in this case that the majority found that the court below did, in fact, charge the jury that the appellant intended the natural and probable consequences of his act on the charge of an assault with intent to murder, and reversed the judgment for that error; and let us further suppose that the prosecuting witness has died in the meantime from the effect of his wounds, and that the charge against the appellant is changed from assault with intent to murder to a charge of murder. On the trial of the latter charge the court instructs the jury that a sane man intends the natural and probable consequences of his voluntary act, and this court affirms the judgment. It is thus established by two solemn judgments of this court that a man intends the natural and probable consequences of a certain act, and that he does not intend the natural and probable consequences of the same act, and, in the opinion of the majority, both judgments are founded on correct legal principles.

In fact, the judgment in this case is affirmed solely because the majority concludes that the court below in one breath told the jury that the appellant was presumed to intend the natural and probable consequences of certain acts, and in the next breath told them exactly the contrary. I do not care to indulge in any such refinements, but vote for affirmance on the broad ground that the instruction excepted to embodies a correct statement of the law as to any or all of the crimes charged.

ROOT, J., concurs with RUDKIN, J.

[No. 5825. Decided December 28, 1905.]

Elizabeth Chapin Bancroft, *Respondent*, v. John W. Godwin *et al.*, *Appellants*.[1]

Landlord and Tenant—Remodeling Building—Negligence. A landlord is liable to his tenant for damage caused by the negligence of contractors in remodeling the building, whether they are principal contractors, employed by the landlord, or subcontractors.

Appeal and Error—Review—Verdict Contrary to Erroneous Instructions—Error Without Prejudice. Where a landlord is liable to his tenant for damage caused by the negligence of contractors in remodeling the building, the verdict of a jury against the landlord will not be set aside because contrary to an erroneous instruction to the jury to the effect that the landlord would not be liable for the negligence of the contractors.

Landlord and Tenant — Damage to Goods of Lessee by Sub-Contractor—Liability of Principal Contractor. A contractor for the remodeling of a building under a contract with the landlord is not liable to a tenant for damages to his goods sustained through the negligence of a subcontractor.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 7, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed in part and reversed in part.

Allen, Allen & Stratton and *Gill, Hoyt & Frye*, for appellants.

G. F. Bogue, for respondent.

Root, J.—Respondent commenced this action to recover damages against the appellants jointly, on account of an injury to a stock of goods, caused by leakage of water upon the same while contained in a building which she had leased for store purposes from appellant Godwin, and which building, at the time of the injury complained of, was being remodeled. Appellant Godwin interposed an answer denying all the material allegations of the complaint tending to charge

[1]Reported in 83 Pac. 189.

him with liability. The appellants Ryan & Co. interposed an answer containing some denials, and setting forth an affirmative defense to the effect that the actual work of remodeling this building was being done by one McDonald, who was an independent subcontractor. Upon the trial the jury returned a verdict in favor of respondent, as against all the defendants, in the sum of $500. Motions for new trial were interposed by Godwin and by Ryan & Co., respectively, and each also moved for a judgment in his favor *non obstante veredicto.* All of these motions were denied, and judgment was entered in accordance with the verdict. From this all of the defendants appealed.

Numerous errors are assigned upon rulings of the court touching the introduction of testimony; but an examination of these rulings convinces us that no substantial or reversible error was committed. Among other instructions the court gave the jury the following:

"In this connection I charge you that T. Ryan & Co. were not the servants and employees of said Godwin,"

and further:

"If you find that the damage was not done by any of Godwin's negligence, or the servants of Godwin, but was done by T. Ryan & Co., his agents or servants, or by any other subcontractor, then you must find in favor of Godwin, as I have instructed."

It is contended by appellant Godwin that, under this instruction, no verdict should have been rendered as against him, and that said instruction was binding and conclusive, even though it should be deemed incorrect as a proposition of law. As a matter of law, in the light of the facts in this case, this instruction was erroneous. The proposition therein contained would be sound if Godwin's liability depended merely upon the question of negligence, and was purely a matter of tort. It is alleged in the complaint, and shown by the evidence, that the remodeling of this building was done in such a careless and unskillful manner that, during a rain

storm, the water found its way through the roof and ceiling, and caused the plastering to be moistened and to fall upon respondent's goods, to their serious damage. Godwin had entered into a contract with Ryan & Co. to do the work of remodeling this building. Ryan & Co. had sublet or transferred the contract to McDonald, who had sole charge of the manner in which the work was done, neither Godwin nor Ryan & Co. participating therein. Hence, no tort on the part of Godwin occasioned the injury complained of.

But it must be remembered that the relation of landlord and tenant existed between Godwin and respondent. The former had leased these premises to the latter as a store building, and by virtue of said lease, actually, or by implication, guaranteed that he would neither do, nor permit to be done, anything which would render said premises unfitted for such purpose, or disturb the substantial enjoyment by his tenant thereof, as contemplated by said lease. When he undertook to remodel said building, it was incumbent upon him to see that said modification was accomplished in such a manner as not to damage the goods of his tenant, or in any way seriously interfere with the beneficial enjoyment of the tenancy created by said lease. Having, however, caused this remodeling to be undertaken, and not having supervised it so as to avoid impairing his tenant's property and substantial rights, he became liable in damages for the injury thereby wrought. *Wusthoff v. Schwartz,* 32 Wash. 337, 73 Pac. 407.

The rule contended for by appellant Godwin, that the verdict of a jury which is contrary to an erroneous instruction of the court should be set aside, we cannot apply in this case. There are doubtless some cases where this is a proper and salutary rule. But we do not deem it such where the facts are as this record reveals. We do not think the former decisions of this court are such as to establish this as a rule applicable in all cases of erroneous instructions followed by verdicts inconsistent therewith. The verdict of the jury, so far as it affects Godwin, will not be disturbed. For the rea-

sons already suggested, the motion of defendant Godwin for a judgment notwithstanding the verdict was properly denied.

The motion for judgment in favor of Ryan & Co. *non obstante veredicto* should have been granted. No relationship of landlord and tenant existed between respondent and Ryan & Co. There were no contractual relations whatever between them. If respondent had any cause of action against Ryan & Co., it was in tort arising by reason of the careless and negligent manner in which the work was being done. But it was alleged and established by the proof that Ryan & Co. neither did this work nor had any supervision, control, or management thereof. Any negligence or carelessness was not theirs, but entirely that of their subcontractor, McDonald. As the latter did the work in his own manner and without the direction, control, or supervision of the original contractor, he became and was an independent contractor, and was directly responsible for his acts and omissions, and incapable of charging the original contractor with any negligence committed in the carrying out of the contract. *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294.

The judgment of the honorable superior court, in so far as it affects the appellant Godwin, is affirmed. In so far as it affects the defendants Ryan & Co., it is reversed and remanded with instructions to dismiss the action as to said appellants.

MOUNT, C. J., CROW, HADLEY, and RUDKIN, JJ., concur.

DUNBAR, J. (concurring)—I concur in the result, but wish to emphasize my disapproval of the rule contended for by the appellant that the verdict should be set aside because it does not accord with the instructions, considering the instructions to be erroneous. The object of a lawsuit is to do justice to litigants and when it is manifest to an appellate court that justice has been done, and it appears conclusively that errors of law have been errors without prejudice, it will not defeat the ends of justice by reversing a case which has been rightly decided.

[No. 5895. Decided December 28, 1905.]

B. K. SHORT, *Respondent*, v. THE CITY OF SPOKANE, *Appellant*.[1]

APPEAL AND ERROR—REVIEW—NEW TRIAL. The granting of a new trial will not be reversed when the ground for granting the same does not appear from the record or the briefs.

MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—FILING CLAIM. An ordinance requiring claims against a city to be presented to the city council within three days, where injuries are alleged to have been caused by the existence of snow or ice, does not apply where the gist of the negligence alleged was a broken plank with no support for the broken end, which defect had existed long prior to the injury, and the mention of snow and ice in the complaint was only incidental, and a condition of the accident, and not a primary or essential cause contributory to the accident.

SAME—INSTRUCTIONS—NOTICE. It is misleading to instruct the jury that a city is liable for only such defects in sidewalks as are apparent or suggested by appearance or disclosed by a test in the nature of ordinary use; but the jury should be instructed that a city is chargeable with notice of a dangerous opening in a sidewalk if it had existed such a length of time that the city might have discovered it by exercising ordinary care.

SAME—DEGREE OF CARE. In an action for injuries sustained upon a sidewalk affected by snow and ice, it is proper to instruct the jury to the effect that the city's duty to keep sidewalks in repair may be measured or affected by weather conditions.

SAME—DAMAGES—AGGRAVATION OF DISEASE. In an action for personal injuries sustained through a defective sidewalk, an instruction is proper which declares that the city is chargeable with notice of the fact that people of different bodily conditions have a right to travel thereon, and the city would be rendered liable for the aggravation of disease or bodily defects resulting from injuries caused by the city's negligence.

SAME—CONTRIBUTORY NEGLIGENCE. It is proper to instruct that the city would be liable for its negligence which was the proximate cause of the injury although the plaintiff may have been guilty of contributory negligence which was only a remote cause or condition of the accident.

[1]Reported in 83 Pac. 183.

Appeal from an order of the superior court for Spokane county, Belt, J., entered December 28, 1904, setting aside the verdict of a jury rendered in favor of the defendant, and granting a new trial on motion of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

J. M. Geraghty, Alex M. Winston and *F. M. Dudley (Charles P. Lund,* of counsel), for appellant.

Ed. B. Powell and *Barnes & Latimer,* for respondent.

DUNBAR, J.—This action was brought by plaintiff to recover damages for alleged personal injuries on account of an alleged defective condition of a sidewalk in the city of Spokane. The complaint contained the ordinary allegations of negligence on the part of the city. Damages were asked in the sum of $5,000. The defendant denied the material allegations of the complaint, and pleaded contributory negligence on the part of the plaintiff, and that the claim of plaintiff was not filed within the time required by the city charter. By replication the affirmative defenses were denied. The case went to trial before a jury, resulting in a verdict for defendant. The plaintiff filed a motion for a new trial, which was granted by the court. From this order the defendant has appealed.

The errors alleged are, that the court erred in refusing to sustain defendant's motion for a nonsuit at the close of plaintiff's case, in refusing to sustain defendant's motion made at the close of the case to direct a verdict for defendant, in setting aside the verdict of the jury for defendant, and in granting a new trial. This judgment would probably have to be affirmed in any event, for the reason that it does not appear from the record, nor indeed from the briefs of the respective parties, upon what ground the new trial was granted. It might have been because the court had concluded that error was committed in giving or refusing to give in-

structions, or it might have been because the court concluded that the verdict was not justified by the weight of the testimony. But in view of the possibility of a new trial, we think it advisable to pass upon some of the errors which are claimed by the respondent to have been committed by the court in the giving and refusing to give instructions, and upon the contention of the appellant that in any event the new trial should not have been granted for the reason that the defendant's motion for a nonsuit, at the close of the plaintiff's case and at the close of the whole case, should have been granted by the court. If this contention is true, then the alleged errors in regard to the instructions would be immaterial. But from an examination of the testimony, we are satisfied that the motion for a nonsuit was properly denied. Section 220 of art. 14, of the charter of the city of Spokane, among other things, provides that:

"All claims for damages for personal injuries or for injuries to property alleged to have been sustained by reason of the negligence of the city, or any officer, agent, servant or employee thereof, must be presented to the city council within one month after any such injuries shall have been received in the manner hereinafter in this section provided; *Provided,* however, that in addition to the filing of the claim as hereinabove provided, where such injuries are alleged to have been caused by the existence of snow or ice, on a street, highway, sidewalk, bridge or crosswalk, notice of such injury, in writing, signed by the person injured, or the owner of the property injured, or by some one on his or her behalf, must be filed with the city clerk within three days after said injury shall have been sustained."

From an investigation of the complaint in this case, we fail to perceive that there is any allegation that the injury was caused by the existence of snow or ice, but the mention of snow and ice in the complaint was incidental, the gist of the negligence alleged being that a plank in the sidewalk was broken in two, a portion of said plank falling through to the ground, and the remaining end of the plank, for several

feet from the break, was sunk below the boards at the sides of it; that there was no support for the broken end of the plank, and said plank would bend easily under slight pressure; that by reason of such condition, said plank and walk were dangerous and defective, which condition had existed for a long time prior to the date of the injury to this plaintiff, and was known, and by reasonable care should have been known, to said city and the officials thereof, but the said city negligently failed to fix said walk and plank; and that, while passing along said walk, the plaintiff stepped upon said broken plank and fell, whereby the injury occurred—describing the injury. Neither can it be maintained from the proof that the snow or ice (there being a couple of inches of snow on the sidewalk) was the cause of the injury. It was simply a condition of the accident; but the broken plank was the primary and essential cause contributing to the accident. This is shown by the testimony of the plaintiff and his witnesses who testified on that subject. We have omitted to mention that this claim was not filed with the city council within the three days required by the proviso in the ordinance quoted above, but was filed within thirty days from the time the accident occurred; and from the pleadings and testimony, we conclude that the plaintiff was not estopped from prosecuting his case by not filing his claim within the three days.

The court gave the following instruction, which is also claimed as error by the respondent:

"In the absence of actual notice, municipalities are liable only for such defects in sidewalks as are apparent or suggested by appearance or disclosed by a test in the nature of the ordinary use of such walks."

If the court meant by this language that no higher duty rested upon the guardians of the city than to take such notice of the condition of the walks as would be taken by any person walking over the same, the instruction was too limited, for it leaves out of account the duty of inspection and supervision with which the officers of the municipality are charged.

The court did instruct lucidly in relation to the care generally which the city should exercise, but seems to have defined in the instruction which we have quoted its duty in the absence of actual notice, which might have been misleading to the jury. The respondent proposed on that question the following instruction, which the court refused to give:

"You are instructed that a city is chargeable with notice of a dangerous opening, hole, or defect in a public sidewalk or street, although actual knowledge may not have been brought home to it or any official of it, if the evidence shows that such a state has existed for sufficient length of time so that the city, by exercising ordinary care might have learned of its condition, and not to know such fact would be negligence on the part of the city."

This is a correct and clear statement of the law applicable to the case being tried, and should have been given. He also proposed this further instruction:

"This duty to keep a sidewalk in such repair that it is reasonably safe for ordinary travel extends throughout the entire year and during weather conditions such as are customary, and can reasonably be expected. If the walk should be in such shape that it would be safe in the summer during good weather, but would be dangerous during stormy weather in the winter, if the city had notice of such defects it would be guilty of negligence in allowing such walks to remain defective during the bad weather."

It would seem that, under the circumstances of this case, this instruction was pertinent and unobjectionable.

The respondent also asked the court to give the following instruction, which the court refused to give:

"The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby. The proximate cause of an injury is the efficient cause. The public streets and sidewalks in a city are not constructed and maintained for the

sole use of the healthy and robust people, but for the use of the infirm, the sick and decrepit as well. They may be lawfully traveled by every sitizen, without regard to age, sex, or physical condition. If the city negligently permit such streets and sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured, the city is liable for the injury. The city is chargeable with the knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit and those with organic predisposition to disease. The city is chargeable with knowledge that all classes of persons, including both the healthy and diseased and lame constantly travel its streets and sidewalks, and that such disease or lameness might greatly aggravate a bodily injury. Hence the city has reasonable ground to expect that if one of that class, who are diseased or lame, is injured by reason of a defect in the sidewalk or street, the disease or lameness might develop and retard or prevent a cure."

This instruction should have been given, under the rule announced in *Jordan v. Seattle,* 30 Wash. 298, 70 Pac. 743.

The court also refused the following instruction asked by the respondent:

"You are instructed that, if you find that the defendant was guilty of negligence, which negligence was the proximate cause of the injury, the plaintiff will be entitled to recover even though plaintiff may have been guilty of negligence, if the negligence of the plaintiff was only a remote cause or a mere condition of the accident."

This instruction was approved in *Redford v. Spokane St. R. Co.,* 15 Wash. 419, 46 Pac. 650.

The judgment is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, ROOT, and CROW JJ., concur.

FULLERTON, J. (concurring)—I concur in the result, but do not wish to be understood as concurring in the holding that it was error to refuse to give the requested instructions. The plaintiff is not appealing, and whether or not the court refused to give his requested instructions is not here for review.

[No. 5887. Decided December 28, 1905.]

CHARLES C. RAPP *et al., Respondents,* v. LOUIS B. STRATTON, *Appellant.*[1]

MUNICIPAL CORPORATIONS — VACATION OF STREETS — NOTICE — COMPLIANCE WITH STATUTE. Under 1 Hill's Code, §§ 749, 752, providing for the vacation of streets and alleys and requiring certain notice to be given, a record of the city council showing the receipt of a petition for the vacation of an alley, that the committee on streets reported favorably, and that the petition was granted, is insufficient to show a legal vacation, or to raise the presumption that the required notice was given, as such proceeding was only preliminary.

SAME—PETITION—ESTOPPEL. One who petitions for the vacation of an alley, which is denied, is estopped from asserting that the same was vacated at some prior time.

ADVERSE POSSESSION—OF CITY STREETS. Title to an alley held by a city for public purposes cannot be acquired by adverse possession.

Appeal from a judgment of the superior court for Spokane county, Linn, J., entered September 6, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining the obstruction of an alley. Affirmed.

Hamblen, Lund & Gilbert, for appellant.

Joseph B. Lindsley, for respondents.

DUNBAR, J.—Plaintiffs brought this action alleging, ownership of property in block 20, of Stratton's addition to Spokane; that an alley extends north and south through the center of said block on which the property of plaintiffs abuts; and that defendant is wrongfully and unlawfully, and with intent to deprive said plaintiffs of the use of said alley, attempting to appropriate and use the same as her own private property and has placed barriers and obstructions across the same, etc.; asking that she be perpetually enjoined. An answer was filed alleging, in substance, that the alley in question was va-

[1]Reported in 83 Pac. 182.

cated by the city council of Spokane on the 25th day of April, 1888, and further setting up the right of defendant to the alley by adverse possession for over ten years. The reply denied both these allegations, and upon these issues, the cause went to trial, and terminated with a judgment in favor of the plaintiffs; and an injunction was issued restraining the defendant from interfering with the public use of the alley. From this judgment, this appeal was prosecuted.

There are but two questions to be determined in this case, (1) was the alley vacated, and (2) if it was not, has the defendant obtained title to the same by adverse possession. The appellant had been the owner of the lots now owned by the respondents for several years prior to her conveyance of them to respondents' grantors. In her deed to the respondents' grantors, they were described as being in accordance with the records of the plat on file, and the recorded plat showed the existence of the alley in question. The only evidence of the vacation of this alley is two entries in the records of the city council. The first appears under date of March 21, 1888, in the following recital:

"A petition from the Centenary church asking the vacation of the alley in block 20, Stratton's addition, was received and referred to the committee on streets and alleys;"

and on page 186 of the record, the following is found:

"The committee on streets and alleys reported favorably on the petition to vacate an alley in block 20, Stratton's addition, which, on motion of Mr. Waters, was granted."

That is all there is in the records of the council proceedings on the subject of the vacation of this alley.

The law governing the vacation of streets and alleys at the time of the alleged vacation of this alley was 1 Hill's Code, § 752, which is as follows:

"In cases where any person interested in any incorporated town in this state may desire to vacate any street, alley, lot, or common, or any part thereof, it shall be lawful for such person to petition the trustees in like manner as persons inter-

ested in towns not incorporated are authorized to petition the board of county commissioners; and the same proceedings shall be had thereon before such trustees, or other body corporate having jurisdiction, as are authorized to be had before the board of county commissiners; and such trustees or other corporate body may determine on such application, under the same restrictions and limitations as are contained in the foregoing provisions."

And § 749, as follows:

"Any person or body corporate interested in any town in this state not incorporated, who may desire to vacate any lot, street, alley, common, or any part thereof, or may desire to vacate any public square, or part thereof, in any such town, it shall be lawful for any such person or corporation to petition the board of county commissioners for the proper county, setting forth the particular circumstances of the case, and giving a distinct description of the property to be vacated, which petition shall be filed with the county auditor twenty days previous to the sitting of said court, and notice of the pendency of said petition shall be given for the same space of time, by written or printed notices set up in three of the most public places in said town, containing a description of the property to be vacated."

It does not appear from the record affirmatively, or even by implication, that the law in relation to notice was complied with, or that anything was done beyond accepting the report of the committee. This was mere preliminary action, and from it alone the court is not authorized in presuming that the prescribed notice was given, or that an ordinance was passed finally vacating the alley. Streets and alleys are of too much importance to the public to be obliterated by a showing of this kind. As tending to show the view taken by the appellant on this proposition, some time before the commencement of this action she petitioned the city council for the vacation of this alley, which petition, upon consideration by the city council, was rejected. Under the rule announced in *Unzelman v. Snohomish,* 40 Wash. 588, 82 Pac. 911, the appellant would be estopped from now claiming that the street

had been vacated at a prior time. In any event, so far as the question of title by adverse possession is concerned, this court held in *West Seattle v. West Seattle Land etc. Co.*, 38 Wash. 359, 80 Pac. 549, that a party could not acquire title by adverse possession to property held by a municipality in its governmental capacity for public purposes. The property upon which the appellant is seeking to obtain title by adverse possession is confessedly held by the city as a trustee for the public, and not as property of the municipality.

There being no error in the case, the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, CROW, and ROOT, JJ., concur.

[No. 5694. Decided December 28, 1905.]

THOMAS DOUGLAS, *Respondent*, v. BADGER STATE MINE, *Appellant*.[1]

APPEAL—BOND—CONDITIONED AS COST AND SUPERSEDEAS. Upon appeal from a judgment foreclosing a laborer's lien in the sum of $1,475 with $300 attorney's fees, in which no order of court is made fixing the amount of the supersedeas bond on appeal, an appeal bond in the sum of $200 conditioned also as a supersedeas bond, is sufficient to give the court jurisdiction of the appeal, where it is apparent from the instrument that the condition for a supersedeas was included inadvertently, and there was no attempt to employ the same as a supersedeas, and both parties treated the same as an appeal bond only (RUDKIN and DUNBAR, JJ., dissenting).

JUDGMENT—VACATION—EXCUSABLE NEGLECT. It is an abuse of discretion for the trial court to grant a motion for default and deny an application to vacate the same, where it appears that the defendant's counsel, whose residence was 200 miles from the place of trial, served by mail a motion to make the complaint more definite and certain, submitting the same with a written argument, and relied upon the opposing counsel to give notice of the disposition of the same, not knowing when the same would be heard, which notice was not given; and upon motion for default being made eleven days after the disposition of the defendant's motion, the defendant's coun-

[1] Reported in 83 Pac. 178.

sel presented an affidavit of meritorious defense and tendered an answer, and leave to file the same was denied; since the facts present a case of excusable neglect in not being represented at the hearing and answering in time, calling for a denial of the default upon terms (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting).

Appeal from an order of the superior court for Chelan county, Steiner, J., entered March 3, 1905, in favor of the plaintiff, after a hearing on the merits, denying defendant's petition for the vacation of a default judgment. Reversed.

Smith & Cole, for appellant.

Frank Reeves and *Reeves & Reeves,* for respondent.

ROOT, J.—At the threshold of this case we are confronted with a motion to dismiss the appeal, for the reason that the undertaking is conditioned as both an appeal and supersedeas bond, while in the sum of only $200. The appeal sought to be taken was from a judgment and decree foreclosing a laborer's lien in the sum of $1,475, with $300 attorney fees and costs, upon certain mining claims of appellant. The trial court was not asked to, and did not, fix the amount of any supersedeas. Appellant maintains that the bond was not intended as a stay bond, but that a printed form was used containing the supersedeas clause which was unnoticed at the time. It is not claimed by respondent that the undertaking was ever used, or sought to be used, as a supersedeas bond. In fact, it was stated in the briefs and orally at the argument, and not denied, that, after the giving of the bond, respondent's attorneys wrote to appellant's attorneys, threatening to have execution issue unless a supersedeas bond should be given. A copy of said letter appears in an affidavit on file herein, and is undenied. This would seem to show that both parties treated the instrument as an appeal bond only.

But it is suggested that this court must look solely to the instrument itself, and not consider extrinsic matters. How about examining the trial court's order fixing a stay bond? Without conceding ourselves to be thus restricted, let us see

what this bond reveals when scrutinized. We find two of its parts inconsistent with each other. The penalty is stated in the sum of only $200, the lowest possible sum sufficient for *any* bond on appeal—a sum inadequate for any other than a mere appeal bond. Then, turning to another portion of the bond, we find words commonly found in an appeal and supersedeas bond. Consequently, one part indicates an intention that it should be merely an appeal bond. The other part indicates that it was intended for both an appeal and supersedeas. When a written instrument has two portions inconsistent with each other, what is the duty of a court? It is the province of the court to examine the entire instrument and, from a consideration of all its parts, give a construction that shall effectuate the evident intention of the makers of the instrument. Where one item of an instrument is absolutely inconsistent with another, it is evident that one or the other of said items was placed or left in such instrument inadvertently. It is not to be presumed that parties would intentionally incorporate in a document two irreconcilable expressions. The writing is to express the intention of the makers. It is inconceivable and unthinkable that the maker of a written instrument should intend two things, one of which is diametrically opposed to the other; or that he endeavored to express two purposes, the existence of one of which would necessarily destroy the other. As the sum of $200 could in no manner, and under no circumstances, constitute the penalty of an appeal and supersedeas bond, we must find that it was incorporated inadvertently, if we believe appellant intended the bond to be both an appeal and supersedeas.

On the other hand, if we believe appellant to have intended merely an appeal bond, then we must conclude that the supersedeas words were placed or left in the bond by mistake or oversight. In preparing a bond on appeal, into which error would an attorney be most likely to fall, that of writing the penalty only $200 when he intended it to be $3,300 or more,

sufficient to constitute both appeal and supersedeas, or in leaving in the supersedeas words when only an appeal was intended? It seems to us that the leaving in of the unnecessary supersedeas clause might be a very natural oversight; but that any attorney would write or leave in a bond the words or figures "$200," when he meant $3,300, or some larger sum, would be a very unusual mistake. Then the mention of the amount of the judgment shows plainly that there was no lack of intention to write in the amount of the bond as $200. In fact, there is nothing to show that the writing of the amount as $200 was unintentional, or an inadvertence. It is perfectly evident that appellant intended the penalty to be, and to be written therein as, $200. This being true, it follows that it could not have intended the supersedeas words, the effect of which, if given any, would be to squarely contradict the significance of the language expressing the penalty as $200. If the penalty were any sum in excess of $200, a different question would be presented. But, in this case, the fact of the bond expressing the minimum penalty fixed by the statute, in the absence of any showing of its having been used, or attempted to be used, as a stay bond, precludes the idea that it was ever intended for any purpose other than that of an appeal bond.

Respondent cites several decisions of this court in support of his motion. But in all of those cases the bonds were clearly *intended* as both appeal and supersedeas bonds; and in some, if not all, they actually performed the functions of stay bonds before being challenged here. In the first of said cases, *Pierce v. Willeby,* 20 Wash. 129, 54 Pac. 999, the trial court, upon application of appellant, fixed the amount of the supersedeas bond in the sum of $200. The appellant then executed an undertaking in the form of an appeal and supersedeas bond, making the penalty, however, only $200. A stay was actually obtained under said bond. The appellant having used it as a stay bond to supersede the judgment, this court held it to be merely a supersedeas bond, and insufficient.

to effect an appeal. In the case at bar no intention, attempt, or purpose to make or use a supersedeas bond appears. The contrary is affirmatively shown. This case is clearly distinguishable from all those cited. The motion to dismiss the appeal is denied.

Appellant, defendant below, is a corporation, having its principal office at Seattle, King county, Washington. This action was commenced in the superior court in and for Chelan county. Appellant's attorneys reside and have their offices in Seattle. The office of respondent's attorneys is in Wenatchee, Chelan county. To the complaint, appellant interposed a motion to make more definite and certain. This motion was noticed to be heard before the superior court in Chelan county on the 5th day of December, 1904. The judge of that court presides over the superior courts of four counties, and his time is consequently divided among said counties. Not knowing whether or not the judge would be at Wenatchee on the said 5th day of December, appellant's attorneys did not go over to Wenatchee, but prepared and sent to the court a written argument upon the motion. As a matter of fact, the judge was not in Wenatchee on said 5th day of December, but arrived the next day and proceeded to consider the motion, and denied the same. Appellant's attorneys, not being informed of the court's ruling upon their motion, failed to plead over within ten days. On December 17, eleven days after the court's said ruling, respondent moved for an order of default against appellant for not pleading over. Notice of this was received by appellant's attorneys on December 19, and they forthwith prepared an affidavit of meritorious defense and tending to show excusable neglect, and also tendered an answer. These were served and filed December 20, 1904. Respondent moved to strike these, and his motion was set for hearing January 9, 1905; but the the judge again being away, the motion was not heard until January 16, 1905, at which time the answer was ordered stricken and the default entered. Findings, conclusions, and

decree were signed January 20, 1905. On January 23, appellant filed and served a petition to vacate the judgment and for a new trial. This petition was denied, and the decree confirmed on March 1, 1905. From said judgment and decree, this appeal is prosecuted.

Appellant's attorneys contend that they relied upon respondent's attorneys to notify them of the court's ruling upon the motion to make more definite. They urge that, owing to the long distance of the place of trial (some two hundred miles) from their home, and the uncertainty of the judge being there, it was unnecessary for them to be personally present; that they had faith in said motion and expected in any event that respondent's attorneys would notify them of the court's ruling when it should be made. They maintain that their neglect, under all of the circumstances, was only such as is contemplated and covered by the statutory provisions permitting relief from "inadvertence" and "excusable neglect." Respondent contends that it was appellant's duty to be represented, or to have arrangements made whereby it would have been promptly notified of the court's ruling. Conceding this to be correct, did the omission of appellant's attorneys constitute neglect that was inexcusable? That was the question presented to the trial court, and now presented for our consideration.

Appellant's attorneys say that they expected respondent's attorneys to notify them when the court should come and pass on the motion; that they expected this as an act of courtesy such as ordinarily obtains among practitioners. Respondent contends that his attorneys were required by no statute, rule of court, or law to notify appellant's attorneys. This is perhaps true; but if attorneys recognize no obligations toward brother attorneys except such as are imposed by statute, rule of court, or law, what becomes of that professional courtesy which has been cherished and observed by the profession from time immemorial? If an attorney extends to another nothing but what that other may demand as a strict matter of

law and right, there is no courtesy about it; it is but the mere performance of a legal duty. Those engaged in the active practice of the law must encounter many difficulties and annoyances at the best; and were it not for the generous acts of courtesy and kindly consideration that commonly characterize the dealings of attorneys with one another, the drudgery would often become well nigh intolerable.

In the case at bar, the motion of appellant was not merely for delay. It presented a substantial question. It is a serious question whether or not the ruling of the trial court was correct in denying the same. But we are not called upon to pass upon this. We merely mention it to show that it was manifestly interposed in good faith. Had respondent's attorneys notified appellant's attorneys of the court's ruling and thereby given them a chance to plead further, it would certainly have been a courteous and commendable action on their part and in accord with the common practice obtaining among attorneys. Now, because appellant's attorneys relied upon them as attorneys who would practice such courtesies, we do not think they should be humiliated and their client mulcted because of their misplaced confidence and reliance.

Now, let us look a step further. A motion for default was made within a few days. To this appellant responded with an affidavit of excuse and merits. It also tendered an answer which set forth a perfect and complete defense to respondent's complaint. All of this was done promptly and evidenced a good-faith intention to defend. When this was done, respondent, instead of withdrawing his motion for default, insisted upon it, thereby indulging in a practice which, we are glad to say, obtains only to a very limited extent in this state. The action of the trial court in sustaining the motion for default under these circumstances was not only an abuse of discretion, but was violative of both the letter and the spirit of our code which requires that all rules of practice shall, so far as practicable and where a different course is not arbitrarily prescribed by statute or established rule of de-

cision, be construed and applied so as to accomplish substantial justice. Bal. Code, §§ 4953, 4957, 5091.

A portion of said § 4953 says that the court "may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." By the imposition of costs and reasonable terms upon appellant, respondent and his attorneys could have been fully compensated for any expenses, delay, and inconvenience occasioned them by appellant's neglect to timely plead over. This should have been the course pursued by the trial court. A portion of said § 4957 reads as follows: "The court shall, in every stage of an action, disregard any error or defect in pleading or proceeding which shall not affect the substantial rights of the adverse party." Here was a defendant with an answer presenting a just and meritorious defense; but because its attorneys had been guilty of slight neglect, its defense is excluded. The statutory provision regarding "excusable neglect," was enacted for some purpose. That attorneys are not infallible, but subject to the same shortcomings that characterize humanity in general, is recognized by the law, and should be by the courts. If judges who are asked to deal drastically with the interest of litigants whose attorneys make slight mistakes would indulge in a little retrospection, they would probably recall experiences in their own practice that would help to clarify their vision, encourage commendable forbearance, and suggest a course better calculated to subserve the ends of justice and right. The function of a court is to adjudicate the differences existing between litigants and mete out that which is right and lawful, so far as such a consummation may be approximated under the forms of law. They are not institutions where the rights of suitors are to be determined by the prowess, skill, or sharp practice of attorneys on the one side, or by the incon-

sequential errors, omissions, and oversights of the opposite counsel. Technicalities, forms, and rules must not be permitted to defeat the highest purpose of courts—the dealing out of substantial justice—unless, in a given case, an arbitrary statute or established rule of decision positively so requires. *Westland Pub. Co. v. Royal,* 36 Wash. 399, 78 Pac. 1906; *O'Toole v. Phoenix Ins. Co.,* 39 Wash. 688, 82 Pac. 175; *Bloomingdale v. Weil,* 29 Wash. 611, 70 Pac. 94.

Our observations herein are not intended as a censure of respondent's attorneys who, owing to their standing, we are inclined to believe were actuated in their course by hasty and ill-considered counsel rather than by any deliberate purpose to ignore the ethics of the profession. But we have spoken freely for the reason that we do not wish the bar of this state to feel that there is any disposition on the part of this court to sanction the lowering of the high standard of professional ethics which has always been recognized and maintained by said bar. The traditions, ideals, and proprieties of the profession require nothing less at our hands.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to permit appellant to file its answer, and for further proceedings according to law. In lieu of the imposition of terms by the trial court, it is ordered that appellant do not recover costs on this appeal.

MOUNT, C. J., HADLEY, and CROW, JJ. concur.

FULLERTON, J. (dissenting)—I concur in that part of the foregoing opinion which holds the bond sufficient to sustain the appeal. I do not do so, however, on the ground that this bond can be distinguished from others that this court has held insufficient, but because I believe the cases announcing the doctrine that a bond conditioned both as an appeal and supersedeas bond, but sufficient in amount only as an appeal bond, is not good as either, are wrong in principle and should be overruled. In my judgment, a bond sufficient in condition and amount as an appeal bond is good as an appeal bond

regardless of any conditions looking to the stay of the judgment it may contain. Notwithstanding the statute says they may be included in one instrument, the appeal bond and stay bond are inherently distinct. The appeal bond must be given in any event. It is made necessary by statute in order to perfect the appeal. The appeal cannot be heard without it. But the stay bond may be given or not as the appellant chooses. If he wishes to prevent execution of the judgment pending the appeal, he may do so by giving a stay bond as provided by statute. But his rights on the appeal are in nowise affected by his failure so to do. Every question open to him will be heard and adjudged whether he gives it or does not give it. Moreover these bonds may be given in separate instruments. The sureties need not be the same on each. And when separately given the one is not affected by the other. Indeed no court, so far as I have been able to ascertain, has ever held that an appeal bond sufficient in itself to perfect the appeal and good if standing alone, is rendered nugatory by the filing of an insufficient stay bond. Why then should the appeal bond be affected by the stay bond when both are included in the same instrument? I confess my utter inability to find any reason for the distinction, and finding none I believe the holdings of the court to the effect that there is a distinction are wrong.

I must, however, disagree with the opinion on the merits of the case. I find nothing in the record which warrants this court in censuring either the trial judge, or counsel for the respondent. The trial court in adjudging that the showing made by the appellant was insufficient to authorize it to set aside the judgment it had theretofore rendered acted upon a matter within its discretion which this court can set aside only for manifest abuse. It is not enough for us to say that, if we had been personally present and the question had been submitted to us, we would have decided it differently; but we must be able to say that the decision is so far wrong that a reasonable mind, acting without prejudice, and having in view

the just rights of all of the parties, would not have decided it that way. The record, in my judgment, does not enable us to do this. Personally, I cannot even hold that it ought to have been decided differently.

In my opinion, therefore, the motion to dismiss should be overruled and the judgment affirmed.

RUDKIN, J. (dissenting)—In *Pierce v. Willeby,* 20 Wash. 129, 54 Pac. 999, decided more than seven years ago, this court held that a bond on appeal conditioned as both a cost and a supersedeas bond, which was not sufficient for both purposes, was not sufficient for any purpose, and dismissed the appeal. In that case the trial court fixed the amount of the supersedeas in the sum of $200, and a bond in that amount conditioned both as a cost and a supersedeas bond was filed. Such a bond was declared insufficient, and I am unable to distinguish that case from the case at bar. An appeal bond comes before this court without issues and without proofs. We must ascertain the intention of the parties and determine the character of the instrument from what appears within the four corners of the bond. The appeal bond before us is clearly both a cost and supersedeas bond, and complies with all the requirements of the statute governing such bonds, except as to the amount. The argument of the majority, based on the amount of the bond, would apply with equal force in the case of *Pierce v. Willeby.* The latter case has been followed in numberless cases since the decision was rendered, and it should be followed now or overruled. I do not feel called upon to approve or criticize the ruling in that case. It relates exclusively to a question of practice, and so long as the rule established is uniform, it is as easy to comply with the statute as there construed as with any other construction this court might now adopt. However, if the court desires to overrule *Pierce v. Willeby* and the long line of cases following it, I will interpose no objection; but they should not be followed in one case and distinguished away in the next.

I also dissent from what is said on the merits. The majority concede that the appellant was in default, and that the only excuse for such default was the failure of counsel for respondent to notify counsel for appellant of the ruling of the court on a motion to make the complaint more definite and certain. The majority further concede that counsel for respondent were under no legal obligation to give such notice. The trial court held that this was not a case of excusable neglect, and denied an application to open the default and for leave to answer. Applications of this kind are addressed to the sound discretion of the trial court, and I am not prepared to say that an abuse of discretion is shown here. Professional courtesy, undefined and unregulated by law, is a very uncertain guide, and cannot safely be adopted as a rule of practice in the courts. In the broad sense in which that term is discussed in the majority opinion, it belongs in the domain of morals rather than of law.

I think the appeal should be dismissed or the judgment affirmed.

DUNBAR, J., concurs with RUDKIN, J.

[No. 5854. Decided January 2, 1906.]

JOSEPH A. HYDE, JUNIOR, *Appellant*, v. L. B. BRITTON *et al.*, *Respondents*.[1]

PARTITION—EVIDENCE—TITLE OF PLAINTIFF'S PREDECESSOR—TWO PERSONS OF SAME NAME—IDENTITY—BURDEN OF PROOF. In an action for partition, a finding that the plaintiff failed to show any title to the premises is sustained where it appears that the title was formerly held by J. W., of the city of S, that there were two persons in such city by that name, that J. W. had conveyed his interests, and the plaintiff claimed a half interest through heirs of the deceased wife of J. W., whose will made no mention of this property, which was not included in the inventory of the estate, and the plaintiff failed to show by the preponderance of evidence that the title was held by the J. W. who was the husband of the plaintiff's predecessor in interest.

[1] Reported in 83 Pac. 307.

LIMITATION OF ACTIONS—PARTITION—TITLE WITHIN TEN YEARS. An action for the partition of real estate cannot be maintained where it appears that neither plaintiff nor his ancestor, predecessor or grantor, was seized or possessed of the premises at any time within ten years prior to the commencement of the action.

Appeal from a judgment of the superior court for King county, Hatch, J., entered June 30, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for partition. Affirmed.

H. D. Moore, for appellant. The lot was community property. John Webster on the death of his wife, became a tenant in common with her heirs, and had constructive possession of the lot. *Hill v. Young,* 7 Wash. 33, 34 Pac. 144. His grantee succeeded to such constructive possession, and the deed, although recorded, did not constitute an ouster of the cotenants without actual notice, or such notorious acts that notice will be presumed. 17 Am. & Eng. Ency. Law (2d ed.), 680; *Holley v. Hawley,* 39 Vt. 525, 94 Am. Dec. 350; *Warfield v. Lindell,* 38 Mo. 561, 90 Am. Dec. 443; *Page v. Branch,* 97 N. C. 97, 2 Am. St. 281; Freeman, Co-Tenancy, 226, 229; *Cox v. Tompkinson,* 39 Wash. 70, 80 Pac. 1005. Title cannot be acquired by the payment of taxes for seven years; the payments must be made in successive years. *Wettig v. Bowman,* 47 Ill. 17; *Cook v. Norton,* 43 Ill. 396; *McMahill v. Torrence,* 163 Ill. 277, 45 N. E. 269; *White v. Harris,* 206 Ill. 584, 69 N. E. 519. The redemption from a tax sale is not such payment of taxes within the meaning of the statute. *Holbrook v. Dickenson,* 56 Ill. 497; *McDonald v. McCoy,* 121 Cal. 55, 53 Pac. 421. There was no proof that there was claim or color of title made in good faith. *Dane v. Daniel,* 23 Wash 379, 63 Pac. 268; *Biggart v. Evans,* 36 Wash. 212, 78 Pac. 925.

Fred H. Peterson and *H. C. Force,* for respondents. The registration of a deed under which a tenant in common claims

exclusive right is notice to his cotenants of adverse possession. 1 Cyc. 1078; *Foulke v. Bond,* 41 N. J. L. 527; *Puckett v. McDaniel,* 8 Tex. Civ. App. 630, 28 S. W. 360; *Cox v. Tompkinson,* 39 Wash. 70, 80 Pac. 1005. Title by the payment of taxes for seven years was complete. *Philadelphia etc. Trust Co. v. Palmer,* 32 Wash. 455, 73 Pac. 501; *Hinchman v. Whetstone,* 23 Ill. 185; *Capps v. Deegan* (Tex. Civ. App.), 50 S. W. 151; *Murphy v. Redeker,* 16 S. D. 615, 94 N. W. 697, 102 Am. St. 722. There was no evidence to rebut the presumption of good faith. *Hinchman v. Whetstone* and *Foulke v. Bond, supra.*

Root, J.—This is an appeal from a final judgment against the plaintiff and appellant, made and entered by the superior court of King county, in an action for a partition of lot 9, block 10, Cove addition to the city of Seattle. In 1882 this lot was conveyed by the owner to one John Webster. There were in Seattle at that time two men by the name of John Webster. One of these, at that time and for many years thereafter, was the husband of Phoebe Ann Webster, with whom he was residing in the city of Seattle. As to which one of these men the property in question was conveyed, was a question in dispute in this case. In 1884 Phoebe Ann Webster died, leaving as her sole heirs four persons who, in April, 1904, conveyed by quitclaim deed whatever interest they had in said property to the Title Guarantee Company, which shortly thereafter quitclaimed the same to this appellant, who claims an undivided one-half interest in said lot as the successor in interest to the community right of Mrs. Webster.

Respondents claim title to the entire property through a deed executed in 1886, purporting to convey the whole thereof from John Webster to Lewis McCallister, and by certain mesne conveyances made thereafter, all of said deeds being duly recorded soon after execution. The taxes for 1891 and 1892 were paid by persons who, at those dates or when said

taxes became due, claimed to be owners of said property under the deed from John Webster, above referred to, and from whom respondents claim title. In 1898 a certificate of delinquency was issued to King county for taxes upon said property for the years 1893, 1894, and 1895. The taxes thereafter, to and including 1901, were paid by one Albert Meinhardt, who in that year began suit to foreclose said tax certificate. On January 20, 1903, the lot was redeemed by H. R. Carr, who paid the costs of the foreclosure proceedings, and also the taxes for 1902. Respondents acquired the interests of said Meinhardt and Carr, and paid the taxes for 1903.

Appellant, in his complaint, set forth the purchase of said property by said John Webster who was at said time the husband of said Phoebe Ann Webster; alleged the decease of said Phoebe Ann Webster, without having disposed of her interest in this property; alleged the subsequent conveyance by her heirs of their interest in said property, and the acquiring by appellant of whatever right, title, and interest said Mrs. Webster had owned in said property; and prayed for a partition of said property. Respondents denied the allegations of the appellant as to the facts showing or tending to show any community interest on the part of Phoebe Ann Webster in said lot, and set up two affirmative defenses: (1) A plea of the ten-year statute of limitations; (2) that they and their predecessors in interest had for seven years prior to the commencement of this action been in the actual possession, under color of title and in good faith, and had made improvements and payment of taxes on said property during said seven years. The trial court found that the appellant had no title whatever to said land, and also found in favor of the respondents upon both of the affirmative defenses. Exceptions were taken to these findings, and we are called upon to review the same.

As to whether or not the purchasing and foreclosure of a tax certificate by one claiming an interest in property, in-

stead of paying the taxes year by year, would permit such party to avail himself of the provisions of the seven-year statute, would present a serious question; but the view we take of the other questions makes it unnecessary to decide the matter.

Upon the question of title, and upon the question of adverse possession, we think the finding of the trial court should be sustained. This being an action for a partition, the burden of proof was upon the plaintiff to establish his case by a fair preponderance of the evidence. It does not appear that Mrs. Webster was ever in possession of this lot. It appears that she left a will, but did not therein mention the property in question here. In the administration of her estate, said property was not considered and was in no manner dealt with, and it does not appear that her heirs ever made any claim to said property until a comparatively short time before the commencement of this action. Then said lot and several others were conveyed by quitclaim deed to the Trust Company, which, in turn, by quitclaim deed, conveyed the same to appellant, who paid only $200 as consideration for the entire interest conveyed. It is claimed by respondents that the purchase of this property by appellant was purely for speculative purposes. It is not made to appear as to which John Webster this property was conveyed. The burden was on appellant to show that the grantee in the original deed of the property was the identical John Webster who was the husband of Phoebe Ann Webster.

The statute of limitations, in regard to the bringing of actions of this kind, reads as follows:

"The period prescribed in the preceding section for the commencement of actions shall be as follows: Within ten years,—(1) Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action." Bal. Code, § 4797.

In answer to interrogatories submitted by respondents to the appellant, the latter said he did not live upon said lot; and to the question, "What acts of possession has he [appellant] ever performed with regard to said lot, and when?" he answered, "Buying said lot, taking and recording a deed thereto, the lot being unoccupied and unimproved." In answer to questions as to the possession, and as to what acts of possession had been performed by his alleged predecessors in interest, he answered, "I do not know." In answer to a question as to when the heirs of Phoebe Ann Webster first learned of their alleged interest in said lot, he answered, "I am informed that they knew of it first within the present year." We do not think a further review or analysis of the evidence necessary. The plaintiff is not shown by the evidence to have been in the possession or control of the property within the ten years immediately preceding the commencement of the action, and we do not think that the evidence established a title in him to a half, or any other, interest in the said lot. Respondents and their predecessors in interest had exercised dominion over, and claimed, the property adversely against the world since the Webster deed in 1886.

The judgment of the superior court will therefore be affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, RUDKIN, and FULLERTON, JJ., concur.

[No. 5634. Decided January 3, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Carrie A. Krutz, Appellant,* v. WASHINGTON IRRIGATION COMPANY, *Respondent.*[1]

MANDAMUS—TO ENFORCE PRIVATE CONTRACT OF IRRIGATION COMPANY TO DELIVER WATER—ADEQUATE REMEDY AT LAW. Mandamus does not lie to compel an irrigation company to deliver water to a land owner pursuant to a private contract for water to irrigate the plaintiff's lands, since there is an adequate remedy at law in an action for damages.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered December 14, 1904, upon sustaining an objection to the introduction of testimony and withdrawing the case from the jury, denying an application for a writ of mandate to compel an irrigation company to deliver water. Affirmed.

W. H. Bogle and *H. J. Snively,* for appellant. The irrigation company is a common carrier of water, which involves the admission of the interest of the public in its operations and of limitations upon its power to contract. *Prescott Irr. Co. v. Flathers,* 20 Wash. 454, 55 Pac. 635; *Fallbrook Irr. Dist. v. Bradley,* 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. Its contracts may be void because unreasonable. *Wheeler v. Northern Colorado Irr. Co.,* 10 Colo. 582, 3 Am. St. 603. Mandamus is the proper remedy. *Golden Canal Co. v. Bright,* 8 Colo. 144; *Merrill v. Southside Irr. Co.,* 112 Cal. 426, 44 Pac. 720; 17 Am. & Eng. Ency. Law (2d ed.), 523; Spelling, Extraordinary Relief, § 1592.

Ira P. Englehart and *E. F. Blaine,* for respondent.

HADLEY, J.—This is an action in mandamus. The affidavit in support of the application for the writ states, that the Washington Irrigation Company is a corporation, and

[1]Reported in 83 Pac. 308.

is the owner of an irrigating canal, commonly known as "Sunnyside" canal; that it is a common carrier of water for irrigation purposes, and is charged with the duty of furnishing water for irrigation of lands lying under said canal, upon reasonable compensation being tendered and made therefor; that the relator is the owner of certain described lands lying under said canal, amounting to three hundred and twenty acres, more or less, which are arid and dependent upon irrigation to produce agricultural crops; that the relator holds a water deed and water right contract from and with said corporation for water to irrigate her said lands, which contract was executed in November, 1902; that said contract provides that she shall pay annually in advance to the irrigation company, on the first Monday in May of each year from the date of the contract, the sum of one dollar per acre, and in case of default in such payment for the period of thirty days after the same shall become due, the irrigation company shall have the right and option to refuse to furnish water until such rental and arrearages shall be paid in full; that the contract further provides that the irrigation company shall deliver to her a lateral or flume, to be connected with its main or branch canal nearest her land along the line of its right of way, at such point as to the company may seem most practicable, which lateral flume shall be located by the company and shall be constructed and maintained by the relator. The contract further requires that the company shall construct and maintain the necessary works of delivery, except the lateral flume, and shall place and maintain, at the point of delivery, suitable measuring boxes or gates.

The affidavit further states that one branch of the canal is about one-half mile from the north line of the relator's lands, and another branch runs near the west line thereof; that, desiring to cultivate her lands during the year 1904, she notified the company, about March 23 of that year, to designate the point on the canal from which the lateral to

her land should be constructed, and to locate the lateral; that she thereupon tendered to the company the sum of $320 in payment of the annual rental for water for the year 1904, and demanded the delivery of water to her lands during the season of said year; that thereupon the company did indicate that she should receive water through a certain small lateral, running across the lands of one Eaton, but refused and still refuses to furnish her with any water whatever except on condition that she shall pay to the company the sum of $320, claimed by it for water rental for the year 1903, as well as the further sum of $320 as rental for the year 1904; that no water was delivered during the year 1903, and that the company never, at any time prior to March 28, 1904, designated the point from which a lateral to be constructed by the relator should receive water from the canal, and did not locate such lateral; that it has never at any time constructed the necessary works of delivery, and has not provided measuring boxes or gates.

On the above facts the relator asked the issuance of the writ of mandate, to compel the irrigation company to deliver water to her lands for the year 1904, and also to compel it to provide suitable measuring boxes or gates at the point of delivery of the water upon her lands. The company answered the affidavit, making issues thereon, and the cause came on for trial before a jury. A witness was sworn to testify, when the company objected to the introduction of any testimony, and moved that the cause be withdrawn from the jury and that it be dismissed, on the ground that the affidavit did not state facts sufficient to authorize the issuance of the writ of mandate. The objection was sustained, the motion granted, and judgment was entered dismissing the action. From the judgment the relator has appealed.

Appellant assigns as error that the court refused the admission of its offered evidence, and entered judgment of dismissal. She insists that mandamus is the proper remedy in the premises. It will be observed, from the foregoing state-

ment, that the parties entered into a contract by the terms of which respondent is to furnish water to appellant, under certain specified conditions. The contract is a private one between the parties. Appellant argues in her brief, however, that respondent is a public-service corporation, a common carrier of water, and that it is under the duty to furnish water to her lands, upon demand, and upon payment or tender of a reasonable compensation therefor. We need not examine the question as to whether respondent is a common carrier, with such public duties imposed upon it by law as may be enforced by mandate when there is no other adequate remedy. Appellant's application shows that she is not dependent upon the remedy which is provided for the enforcement of a mere public duty. It shows that she holds a private contract whereby respondent has obligated itself to furnish water. She can resort to the ordinary remedies upon that contract as in the case of any private contract.

In support of her contention that mandamus is the proper remedy here, she cites *Price v. Riverside Land & Irr. Co.*, 56 Cal. 431, and *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264. An examination of those cases, however, discloses that each was based squarely upon the theory that there was a refusal to discharge a public duty. It does not appear that a private contract between the parties existed in either case. Our statute provides that the writ of mandate will issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law." Bal. Code, § 5756. This is the general rule, and the courts hold that mandamus is a remedy to compel the performance of a duty required by law where the party seeking relief has no other adequate remedy, and where the duty sought to be enforced is clear and indisputable. *Board of Com'rs v. Aspinwall*, 24 How. 376, 16 L. Ed. 184; *Bayard v. United States ex rel. White*, 127 U. S. 246, 8 Sup. Ct. 1223, 32 L. Ed. 116; *United States ex rel. Redfield v. Windom*, 137 U. S. 636, 11 Sup. Ct. 197, 34 L. Ed. 811; *Territory ex rel. Crosby v. Crum*, 13 Okl. 9, 73 Pac. 297;

State v. Paterson etc. R. Co., 43 N. J. L. 505. In *Florida etc. R. Co. v. State ex rel. Tavares*, 31 Fla. 482, 13 South. 103, 34 Am. St. 30, 20 L. R. A. 419, it was said that mandamus will not lie to enforce the performance of private contracts. See, also, *State ex rel. Poyser v. Trustees of Salem Church*, 114 Ind. 389, 16 N. E. 808; *Parrott v. Bridgeport*, 44 Conn. 180, 26 Am. Rep. 439; Merrill, Mandamus, § 16; High, Extr. Legal Rem. (3d ed.), § 25.

We think appellant has an adequate remedy upon her contract, and that mandamus does not lie. The judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

RUDKIN, J., having heard the case in the court below, took no part.

[No. 5784. Decided January 3, 1906.]

EMMA L. BROWN *et al., Respondents,* v. THE CITY OF BLAINE, *Appellant.*[1]

TRIAL—SETTING CAUSE FOR TRIAL—DISCRETION—REQUEST FOR CONTINUANCE. The action of the trial court in setting a cause for trial on a certain day will not be reviewed in the absence of an abuse of discretion, or any application for a continuance.

APPEAL—REVIEW—HARMLESS ERROR—DAMAGES—SPECIAL VERDICT. In an action for damages for personal injuries, error in admitting immaterial evidence as to an item of damage is harmless where a special verdict was rendered and the damages for such item were eliminated and deducted from the judgment.

SAME — PHYSICIANS SERVICES — EVIDENCE OF VALUE BY AMOUNT PAID—ADMISSIBILITY. In an action for damages for personal injuries, the evidence of the amount paid to a physician for medical attendance is some evidence of the reasonable value of the services, and its admission is therefore not ground for a reversal.

SAME—HEALTH PRIOR TO INJURY—EVIDENCE—ADMISSIBILITY. In an action for damages for personal injuries, evidence of the physical condition of the plaintiff prior to the accident is admissible.

[1] Reported in 83 Pac. 310.

APPEAL — REVIEW — EVIDENCE OF MATTERS ADMITTED — HARMLESS ERROR. In an action for personal injuries sustained in a fall upon a defective sidewalk, it is not prejudicial error to allow a witness to testify to the boards being loose, although the same was immaterial.

DAMAGES—PERMANENT INJURIES—EVIDENCE—MORTUARY TABLES—ADMISSIBILITY. In an action for damages for personal injuries, where there was evidence that the injury was permanent, mortuary tables showing the plaintiff's expectancy of life are admissible.

MUNICIPAL CORPORATIONS — NEGLIGENCE — STREETS—CONDITION OF WALK PRIOR TO INJURY—ADMISSIBILITY—COMPLAINT—SUFFICIENCY. In an action for personal injuries sustained through a defect in a sidewalk, the allegation in the complaint that the city carelessly neglected to nail down the planks knowing of the unsafe condition of the walk, is sufficient to authorize evidence of constructive notice on the part of the city by the existence of defects prior to the time of the accident.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 7, 1905, upon the verdict of a jury rendered in favor of the plaintiffs, after a trial on the merits, in an action for personal injuries sustained through a defective sidewalk. Affirmed.

George D. Montfort and *Whitcomb & Mathis,* for appellant.

Frank W. Bixby and *Fairchild & Bruce,* for respondents.

DUNBAR, J.—Action for damages for injuries sustained by the respondent Emma L. Brown, by falling on a sidewalk in the city of Blaine, by reason of the alleged negligence of said city in allowing said sidewalk to become and remain out of repair. Judgment was rendered for $1,750, which was afterwards reduced to $1,540, from which judgment this appeal is taken.

The answer of the appellant was a general denial, with an affirmative allegation that the defendant is informed and believes that, on or about the 15th day of July, 1904, the Sunset Telephone and Telegraph Company, a corporation, owning and operating a system of telephone poles, wires, etc., in the city of Blaine, wilfully, negligently, and carelessly

loosened the aforesaid planks; that said telephone company replaced and left said planks in their proper places, but wilfully, negligently, and carelessly failed and neglected to nail or fasten said planks; that the fact that said planks were loose or that they had been disturbed by said telephone company was not apparent, and could not be determined by looking at said sidewalk; that, as far as the eye of an observer could tell or detect, the said planks were firmly nailed and secured in their places.

The reply to the affirmative matter was to the effect that the Sunset Telephone and Telegraph Company, referred to in said answer, was under a contract with the city of Blaine by which the said Sunset Telephone and Telegraph Company is authorized and permitted to erect telephone poles in the city of Baline, and that it is authorized and empowered to take up and remove planks from the sidewalks, etc. This is only important as going to the admission of the city that the planks had been negligently and carelessly loosened and left in that condition, which fact eliminates some of the controversies in relation to the testimony in this case, and leaves the question of negligence simply as to the proposition of notice on the part of the city.

The first contention, that the court erred in setting the case for trial on the day on which it was tried, seems to us to be without merit. Such proceedings in the course of a trial are so largely within the discretion of the court that, unless such discretion is manifestly abused, this court will not interpose an interference, and there seems to be no evidence of such abuse in this case. In addition to that, there was no application for a continuance on the part of the appellant.

The following question was asked witness W. H. Brown, the husband of the respondent Emma L. Brown: "Mr. Brown, in moving about—you stated you were married in Minnesota—do you know what it would cost you to get a woman

to do your housework for you, if you were endeavoring to keep house?" This was objected to as irrelevant and immaterial, and the question was answered over the objection. It was contended that the witness did not show qualification to answer, nor was it shown that he intended to keep house, or had been doing so. Whatever may be said as to the merits of this objection, it seems to us to be immaterial, by reason of the fact that the jury found, by special findings, three items of damage—for permanent injury, $1,000; for physical pain, humiliation, and disfigurement, $420; on account of money expended for physician's services and nurse hire, $330. Before judgment was entered, the court made the following announcement:

"Now at this time the court renders oral decision on motion for a new trial and announces that the special findings include one item of damages amounting to $210, for which there is no testimony to support, and under the statute and decisions of the supreme court this amount should be remitted or a new trial granted, and it was ordered that plaintiff be given ten days in which to remit said amount, and on failure so to do, a new trial would be granted."

The plaintiff elected to remit the $210, in conformity with the court's order, and judgment was entered for the amount found by the jury, less that amount. The record does not show what item it was that was found by the jury, and there is no item in the special findings for $210. It could not have been the item for permanent injury or for physical pain and humiliation, because those things were not itemized. The only allegation in the complaint which was subject to itemizing was the charge of $330 on account of money expended. So that the court must have deducted the item of $210 from the claim of $330, which would only leave $120 under that claim, which was incorporated in the judgment; and as there was testimony in relation to the amount paid for doctor's services and for nurse hire to amount to that much, we must conclude that the amount deducted was for

things which were not legally proven. In any event, under the order of the court in relation to the deduction of $210, it affirmatively appears that the error, if any was committed, was not prejudicial.

It is objected also that the court erred in allowing the witness Brown to testify that he had paid a certain amount to the attending physician, the contention being that the amount paid was immaterial; that he should have shown that the payment represented the reasonable value of the services. It seems to us that the amount paid would, in any event, be some evidence of the reasonable value of the services rendered, and that, if it was not sufficient evidence, that was a matter which should have been presented to the consideration of the jury.

The fourth assignment of error, in relation to the amount paid for board, is disposed of by what we have said in relation to the second. Appellant also assigns as error the admission in evidence of the testimony of witness Williams as to the general condition of Mrs. Brown's health and her physical appearance prior to the time of the injury. We think there was no error committed in admitting this testimony. It would have been proper for the defense to have shown in mitigation of damages that, prior to the injury, the woman was in poor health and unable to make a living.

It is also insisted that the court erred in allowing a Dr. Reeves to testify, on direct examination, in relation to the boards being loosened from the nails or fastenings. The question was, "What, if anything, do you know about the boards being loosened from the nails or fastenings?" We think that this exception is without merit, although the testimony was not material under the admissions of the defendant in relation to the boards being loose and without nails or fastenings.

Neither did the court err in permitting the respondents to show by the Carlyle mortuary tables the respondent Emma L. Brown's expectancy of life. The objection is based on the fact that there was no testimony of permanent injury, but

there was sufficient evidence of permanent injury to go to the jury and the jury found that the respondent was permanently injured and the tables were admissible to show the probable duration of the impairment of respondent's health and her inability to earn a livelihood, if the theory of the respondents were to be accepted by the jury.

The eighth, tenth and eleventh assignments are to the effect that the court erred in allowing certain witnesses on behalf of respondents to testify in regard to the condition of the sidewalk at and about the place where respondent Emma L. Brown claims she was injured, at a time previous to the injury; all this evidence was objected to on the theory that notice was not pleaded by respondents in their complaint. The allegation is that, on or about the 31st day of July, 1904, the planks in said sidewalk were loose and unsafe, and the stringers were decayed, so that travel on said sidewalk was dangerous and unsafe, and the said city knew the dangerous and unsafe condition of said sidewalk, and carelessly and negligently neglected to nail down said planks and make said sidewalk safe for the travel of its citizens. The contention of the appellant is that there was no allegation that the sidewalk had been out of repair prior to the 1st day of July, 1904, and there being no proof of communication made to the city of its need of repair, that constructive notice could not be shown under this allegation. But we think that this would be a narrow construction to place upon the allegation, because the language that the city carelessly and negligently neglected to nail the said planks down, knowing of the said unsafe condition of the sidewalk, must be interpreted to mean a knowledge for some appreciable time.

The instructions in this case so completely and carefully state the law, presenting with such exact justness the theory and rights of plaintiffs and defendant in the action, that no objection can be found to them, or the refusal to give other instructions, the instructions given covering all the issues of the case.

We are unable to find error in any respect, and the judgment is therefore affirmed.

MOUNT, C. J., CROW, HADLEY, RUDKIN, ROOT, and FULLERTON, JJ., concur.

[No. 5689. Decided January 3, 1906.]

ELIZABETH A. BARTON, *Appellant*, *v.* MRS. R. A. WICKIZER, *Respondent*.[1]

APPEAL — DISMISSAL — BONDS — AMOUNT OF SUPERSEDEAS BOND — MONEY JUDGMENT FOR BETTERMENTS IN EJECTMENT. Upon appeal by plaintiff from a judgment in ejectment for the possession of premises, requiring the plaintiff to pay the value of improvements, it is not necessary that the amount of the supersedeas bond on appeal be fixed by the court, and a bond in double the amount of the money judgment and $200 additional is sufficient.

EJECTMENT — BONA FIDE OCCUPANTS — ALLOWANCE FOR BETTERMENTS — STATUTES — RETROSPECTIVE EFFECT. Laws, 1903, p. 262, providing that in an action by the owner to recover possession, the *bona fide* occupants of land may offset the value of improvements made in good faith, is not retroactive, and there can be no recovery for improvements made prior to the enactment of said statute.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 17, 1905, upon findings in favor of the plaintiff for possession, and in favor of the defendant for the value of improvements, in an action of ejectment, after a trial on the merits before the court without a jury. Reversed.

F. E. Knowles, for appellant.

Wilson & Thorgrimson and *Jerold Landon Finch*, for respondent.

ROOT, J.—This action was brought by appellant to recover possession of certain real estate in the city of Seattle. It is the second action instituted by appellant against re-

[1] Reported in 83 Pac. 312.

spondent for the recovery of the same property. The first was instituted in November, 1902, and resulted in a decree wherein appellant was found to be the owner of said property, but was denied the right of possession on account of not having made proper demand. In the second action, respondent set up a counterclaim for the value of improvements made on the premises, relying upon the provisions of the betterment law (Laws 1903, p. 262). The trial court made findings of fact to the effect that appellant was the owner in fee simple, and entitled to the immediate possession, of the premises; that a proper demand had been made; that respondent had entered the premises in good faith under color and claim of title, and believing that she was the legal owner; that during the years 1900 and 1901, she had made permanent improvements on said premises of the value of $525, and paid taxes in the sum of $2.25; that respondent made said improvements while holding the property in good faith, under color and claim of title, adversely to appellant; that the value of the realty, apart from the improvements, was $800; that the first action was brought in November, 1902, and resulted as hereinbefore stated.

Conclusions were made and signed in accordance with the findings, and a judgment and decree entered thereupon. In said judgment and decree it was recited, first, that the plaintiff was the owner and entitled to the immediate possession of the premises; then the following provisions appeared:

"(2) That the defendant have and recover from the plaintiff as a counterclaim in this action the sum of $525, for the permanent improvements made by the defendant on said premises and taxes paid on the same. (3) That if plaintiff shall, within two months from the date of the signing of this decree, pay to the defendant said sum of $525, then said plaintiff shall become the owner of, and be vested with the title to, said permanent improvements; that if the plaintiff does not pay said sum of $525, within said two months, then said defendant may, within two months thereafter, pay the plaintiff the sum of $800, the value of said land apart from the improvements, and said defendant shall then be vested

with the title to said land, including said improvements, and be entitled to the immediate possession of said premises and said improvements and each and every part thereof. (4) That, should the plaintiff and defendant both fail to make the payments as provided in paragraph 3 herein, then the plaintiff and defendant shall be and are hereby declared to be and deemed tenants in common of said premises, including said improvements, in proportion to their interests and valuations to said realty and improvements."

From this judgment and decree, the plaintiff appeals.

Respondent moves to dismiss the appeal for the reason that the undertaking on appeal is in the form of an appeal and supersedeas bond, and in an amount equal to, or exceeding, twice the amount of the money portion of the judgment and costs, plus $200, which amount was not, however, fixed by any order or action of the trial court. Respondent's contention is that the amount of the supersedeas bond must be fixed by an order of the trial court in all cases where the judgment is for anything else than money; and contends that the judgment in this case contained provisions which made it other than a judgment for money, as that expression is used in the appeal statute. It is not contended that the amount of the bond is insufficient. In fact, it is conceded that it was sufficient if the rule applicable to money judgments controls. The contention of the respondent with reference to this bond is in opposition to the former holdings of this court, and for that reason cannot be sustained. *State ex rel. Washington Bridge Co. v. Superior Court,* 11 Wash. 366, 39 Pac. 644; *State ex rel. Commercial Nat. Bank v. Superior Court,* 14 Wash. 365, 44 Pac. 859; *Title Guarantee & Trust Co. v. McDonnell,* 28 Wash. 359, 68 Pac. 890; *Lacaff v. Dutch Miller Min. etc. Co.,* 31 Wash. 566, 72 Pac. 112. The motion to dismiss the appeal is denied.

Upon the merits, a former decision of this court is conclusive. In the case of the *Investment Co. v. Hambach,* 37 Wash. 629, 80 Pac. 190, the exact questions involved in this case were passed upon and decided contrary to respond-

ent's contention herein. It was there held that the provisions of the betterment law of 1903 were not retroactive, and that a person could not recover for improvements made prior to the existence of said statute. As the improvements made by the respondent in this case were so made before this statute was enacted, it follows that she cannot offset or counterclaim the same against the owner of the land in a suit brought by him to recover its possession.

The judgment and decree of the honorable superior court is reversed, and the cause remanded, with instructions to enter an unconditional judgment and decree in favor of appellant for the possession of the premises in question.

MOUNT, C. J., DUNBAR, CROW, HADLEY, RUDKIN, and FULLERTON, JJ., concur.

[No. 5365. Decided January 3, 1906.]

FRANK M. CALDWELL, *Respondent, v.* HARRY HURLEY, *Appellant.*[1]

BILLS AND NOTES — INDORSEES BEFORE DELIVERY AS CO-SURETIES. Stockholders of a corporation who indorse the company's note before delivery for the purpose of enabling the company to borrow money for use in its business, are *prima facie* joint makers who are in fact co-sureties.

SAME—PAYMENT BY ONE CO-SURETY—CONTRIBUTION. An action for contribution lies between endorsers before delivery who sign a promissory note as *prima facie* makers and in fact as co-sureties of the principal maker.

LIMITATION OF ACTIONS—CONTRIBUTION OF CO-SURETY—IMPLIED LIABILITY—WRITTEN AGREEMENT. An action for contribution between co-sureties upon a promissory note is upon an implied liability arising out of an express contract, and is controlled by Bal. Code, § 4798, prescribing a limitation of six years for the commencement thereof.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered July 6, 1905, upon findings in

[1] Reported in 83 Pac. 318.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action against a surety for contribution. Affirmed.

T. L. Stiles, for appellant.

Fitch & Harris and *Shackleford & Hayden,* for respondent.

Crow, J.—This action was commenced by respondent, Frank M. Caldwell, against appellant, Harry Hurley, for contribution as co-surety on a promissory note. From a final judgment in favor of said Caldwell, this appeal has been taken.

Appellant demurred to the amended complaint, for the reasons, (1) that it did not state facts sufficient to constitute a cause of action, and (2) that the action was not commenced within the time limited by law. This demurrer being overruled, appellant answered, denying allegations of the amended complaint, and affirmatively pleading the statute of limitations. Upon the trial the court made findings of fact as follows:

"(1) That on the 23d day of January, 1896, at Tacoma, Wash., the Northwestern Supply Company, a corporation duly organized and existing under the laws of the state of Washington, as principal, made and delivered to the Pacific National Bank its promissory note in writing, bearing date on that day, in the words and figures following, to wit:

" '$2,000.00 Tacoma, Wash., January 23, 1896.

" '90 days after date without grace for value received we promise to pay to the order of The Pacific National Bank of Tacoma, two thousand dollars with interest from date at the rate of 10 per cent per annum until maturity, principal and interest payable in U. S. gold coin at The Pacific National Bank, Tacoma, Washington. And in case this note shall be placed in an attorney's hands for collection we agree to pay five per cent upon the amount then due, as attorneys fees, if paid before suit is commenced; if not paid until suit is commenced we agree to pay as attorney's fees ten per cent upon the amount then due, and that the judgment shall include such fees. This note shall bear interest at the rate of twelve per cent per annum after maturity.

" 'No. 16742. Northwestern Supply Co., F. M. Caldwell, Pres.'

"(2) That at the date of said note said Frank M. Caldwell was the president of said Northwestern Supply Company, and the owner of one-half of the stock thereof, and said Harry Hurley was the owner of the other half of said stock. (3) That the consideration of said note was the loan of two thousand dollars by said Pacific National Bank to said Northwestern Supply Company, which sum was received by said company and was used by it in its business; that said Northwestern Supply Company was the principal in said note, and said Caldwell and Hurley were sureties for said principal. (4) That said Pacific National Bank was not willing to loan said money or accept said note without security additional to the signature of said Northwestern Supply Company, and thereupon, to furnish such additional security, said Caldwell and Hurley, before the delivery of said note to said bank, wrote their names on the back of said note thus:

'F. M. Caldwell.
Harry Hurley.'

And that both of said names were written on the back of said note at the same time. (5) That on the 29th day of October, 1897, there being a balance of one thousand and forty dollars and twenty-three cents ($1,040.23) due and unpaid upon said note, the said Frank M. Caldwell being threatened with suit thereon by said Pacific National Bank, did on the 29th day of October, 1897, pay to said bank the sum of one thousand forty dollars and twenty-three cents ($1,040.23), the balance due on said note, and said note was thereupon surrendered to said Frank M. Caldwell by said bank. (6) That after the payment of the balance due upon said note by said plaintiff the said defendant departed from and resided out of the state of Washington for a period of two years, ten months and two weeks prior to the commencement of this action, so that on December 29th, 1904, the time of the commencement of the action, the statutory limitation applicable to causes of action on implied liabilities arising out of written agreements had not run. (7) That this action was commenced on the 29th day of December, 1904. (8) That between the 13th day of October, 1904, and the 29th day of December, 1904, the plaintiff demanded payment of one-half

of the sum paid by him upon said note, to wit, five hundred twenty dollars and eleven cents ($520.11) with interest thereon from October 29th, 1897, of the defendant, but defendant refused to pay said sum or any other sum on account thereof, and has not paid the same."

Upon said findings of fact the trial court made conclusions of law, as follows:

"(1) That by writing their respective names on the back of said note the plaintiff Frank M. Caldwell and the defendant Harry Hurley entered into an agreement in writing whereby they became co-sureties of said Northwestern Supply Company. (2) That the liability existing between said Caldwell and said Hurley by reason of their writing their names on the back of said note was an implied liability arising out of the written agreement and upon the payment by said Caldwell of the balance due upon said note said Hurley, defendant, became legally bound to contribute and pay to the plaintiff the sum of five hundred twenty dollars and eleven cents ($520.11) being one-half of the sum paid by said plaintiff. (3) That this action is not barred by the statute of limitations. (4) That the plaintiff, Frank M. Caldwell, is entitled to a judgment of this court that there is due and owing him from said defendant, Harry Hurley, the sum of five hundred twenty dollars and eleven cents ($520.11) together with interest thereon at the rate of six per cent per annum from the said 29th day of October, 1897, and for his costs and disbursements herein all in conformity to the prayer of plaintiff's complaint."

Appellant has taken no exceptions to the findings of fact; but having excepted to each and all of the conclusions of law and the final judgment, now presents the following assignments of error: (1) Error in overruling the demurrer; (2) error in the conclusions of law; (3) error in rendering judgment for respondent; and (4) error in refusing to render judgment for appellant dismissing the action.

As the allegations of the amended complaint substantially covered all facts found by the trial court, it will not be necessary to pass upon the first assignment of error, all points raised by the demurrer being involved in deciding whether

the judgment is sustained by the facts so found. Appellant in his brief has discussed two propositions, (1) that he is not liable to contribution, being an accommodation indorser only; (2) that this action is barred by the statute of limitations.

In support of his first contention, appellant insists he was not a co-surety with respondent, but an accommodation indorser only, and that, under the greater weight of authority, accommodation indorsers of negotiable instruments, in the absence of an express agreement between themselves, are not liable for contribution. The facts found show said note to have been executed by a corporation in which appellant and respondent each owned one-half of the capital stock; that the money borrowed was used in the business of said corporation and for its benefit; that appellant and respondent wrote their names on the back of said note at the same time and before its delivery to the payee, for the purpose of giving additional security to the payee. The note was executed prior to the enactment of the negotiable instruments act, Laws 1899, p. 340 *et seq.* Under the law of this state, as announced prior to the date of said note, appellant and respondent, under the facts found, were *prima facie* joint makers. *Donohoe-Kelly Bank. Co. v. Puget Sound Sav. Bank,* 13 Wash. 407, 43 Pac. 359, 942, 52 Am. St. 57. The trial court found appellant and respondent to have been co-sureties for the said Northwestern Supply Company. Hence, for the purposes of this case, they occupy the position of *prima facie* joint makers, who are in fact co-sureties. This being true, they were liable to each other for contribution. Daniel, Negotiable Instruments (5th ed.), § 1340; Brandt, Suretyship and Guaranty (2d ed.), § 254.

Appellant's second and principal contention is that this action is barred by the statute of limitations. The statute began to run on October 29, 1897, the date of payment by respondent. After deducting all time appellant was absent from the state, a period of four years, three months, and

sixteen days had elapsed after said payment, at the date of the commencement of this action. If either the three-year or the two-year statute (Bal. Code, §§ 4800, 4801), applies, as contended by appellant, the action is barred. If the six-year statute (Bal. Code, § 4798) applies, as contended by respondent, it is not barred.

Subdivision 2 of said § 4798, reads as follows: "An action upon a contract in writing, or liability express or implied arising out of a written agreement." It seems to be conceded that this is not an action upon a contract in writing; but respondent contends, and the trial court held, that it is an action on an implied liability arising out of a written agreement. This contention is most strenuously resisted by appellant who, in argument, insists that the liability of a co-surety for contribution is not contractual in its nature, but is only an implied equitable liability resting on one man to do what is right by another. There is no doubt but that the doctrine of contribution between co-sureties was originally recognized and enforced in courts of equity only, being based upon the principle that equality is equity. But many modern authorities now hold said liability to be contractual in its nature, and that it arises *ex contractu*.

"The right to contribution has its foundation in, and is controlled by, principles of equity and natural justice and does not arise from contract; but, although the doctrine so originated, it is now almost universally enforced in courts of law on the theory of an implied contract of contribution existing between parties jointly liable *ex contractu*." 9 Cyc. 794, and cases cited.

Said subdivision 2 of § 4798, Bal. Code, differs from the statutes of limitation of most, if not all, the other states. In fact, after a painstaking research, we have found no similar statute. The peculiar feature of our statute is that an *implied liability* arising out of a written instrument is included in the same clause with an *express liability* arising out of a written contract. The legislature evidently thereby intended

that a certain class of actions should be included within the terms of said section which had not in other states been associated or connected with actions on written instruments or actions founded upon written agreements. The liability for contribution of appellant and respondent is an implied liability which arose by reason of their becoming co-sureties on the note. If they had not entered into the written contract which resulted from their signing their names on the back of the note, at the time, under the circumstances, and for the purpose, found by the court, there would be no liability. This liability now exists, is contractual in its nature, and is the direct result of that written agreement by which respondent was compelled to make the payment for which he now seeks contribution. The allegations of the amended complaint, and the facts found by the court, show a cause of action in favor of respondent on account of an implied liability arising out of a written agreement. To place any other construction on our statute would be to hold that the words contained in the last clause of said subdivision 2 were placed there without purpose or meaning.

Appellant, in support of his contention that the six-year statute does not apply, has cited authorities from numerous states, including California, Ohio, and Illinois; but said authorities afford us no assistance, as the statutes upon which they are based are entirely unlike our own in the particular above mentioned. We think the trial court placed the proper construction on said subdivision 2 of § 4798, *supra,* and such construction necessarily leads to the conclusion that this action has been commenced within the time limited by law.

The judgment is affirmed.

Mount, C. J., Dunbar, Fullerton, Hadley, Rudkin, and Root, JJ., concur.

[No. 5744. Decided January 8, 1906.]

ADOLPH PONISCHIL *et al., Respondents,* v. HOQUIAM SASH AND DOOR COMPANY *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS—VACATION OF STREETS—PETITION—SUFFICIENCY. Under Laws 1901, p. 175, a petition for the vacation of a portion of a street is sufficient if signed by the owners of two-thirds of the lots abutting on the portion sought to be vacated.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—VACATION OF STREETS. The vacation of streets is a legislative function which may be delegated by the legislature to municipal corporations.

MUNICIPAL CORPORATIONS—STREETS—VACATION—POWER OF COURTS TO REVIEW. The vacation of streets is an exercise of a legislative or political function that will be reviewed by the courts for collusion or fraud only.

SAME—COLLUSION—BENEFIT TO PETITIONER. The fact that the vacation of a street is for the benefit of the petitioner does not show such fraud or abuse of discretion, as to authorize a court of equity to interfere.

SAME—DAMAGES—TO LOT NOT ABUTTING ON PORTION VACATED—SPECIAL INJURY—SHOWING—SUFFICIENCY. The owner of city lots at the entrance of a *cul de sac* formed by the vacation of a portion of a street, is not entitled to damages for the vacation, unless special damages are sustained different in character from that suffered by the public at large.

SAME—DAMAGES—EVIDENCE. The owner of property does not appear to be specially damaged by the vacation of a portion of a street, forming a *cul de sac* in the vicinity, where the street had never been opened for travel, the business portion of the city was in the opposite direction, and the value of his property was not lessened.

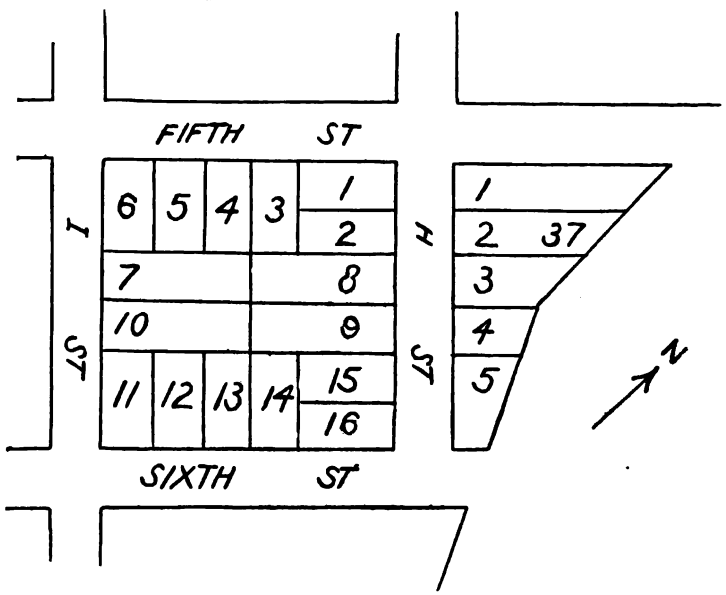
Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 12, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, restraining the vacation of a street. Reversed.

C. W. Hodgdon, for appellants.

Ben Sheeks and *Will Lanning,* for respondents.

[1]Reported in 83 Pac. 316.

Crow, J.—On October 25, 1889, one A. M. Simpson and the Northwestern Lumber Company, a corporation, platted certain lands in Hoquiam, now a city of the third class, and thereby dedicated H, Fifth and Sixth streets to the use of the public. Said plat shows all of block 37 and one-half of block 36 fronting on H street, to be subdivided as follows:



Each lot on H street shown on the above diagram has a frontage of fifty feet, except lot 5 in block 37, which has a frontage of one hundred feet. Long prior to the vacation hereinafter mentioned, respondents Adolph Ponischill and Mary Ponischil, his wife, acquired title to lot 16 in block 36, which they improved and occupied as a homestead. About February 3, 1903, appellants, the Hoquiam Sash & Door Company, a corporation, J. A. Acteson, and Henry Craswell, being the owners of lots 1, 2 and 8 in block 36, and 1, 2 and 3 in block 37, petitioned the city of Hoquiam to vacate that portion of H street upon which their said lots abutted, extending from Fifth street to the easterly line of lot 3 in block 37, and lot 8 in block 36, it being thereby proposed to close

said street for a distance of one hundred and fifty feet from Fifth street. Regular proceedings were taken, which resulted in the granting of said petition and the passage of an ordinance making such vacation.

Respondents appeared at all stages of said proceedings and objected on account of damages which they claimed would necessarily result to said lot 16 in block 36. After said proceedings were completed, respondents commenced this action to enjoin the city of Hoquiam from closing said portion of said street, and also to enjoin appellants from occupying or using the same. Findings were made in favor of respondents, upon which judgment was entered, restraining said city from enforcing said ordinance until the damage to respondents' property should be agreed upon or ascertained by legal proceedings and paid; also enjoining appellants, the Hoquiam Sash & Door Company, a corporation, J. A. Acteson and Henry Craswell, from using, obstructing, or building upon said street until respondents' damages should be settled or ascertained by legal proceedings, and paid. From this judgment the Hoquiam Sash & Door Company, a corporation, J. A. Acteson and Henry Craswell have appealed.

Numerous assignments of error have been made, some of which need not be discussed. Respondents contended below, and now contend, that the ordinance of vacation is void, because the owners of a two-thirds frontage of all lots in blocks 36 and 37, abutting on said H street, did not petition therefor. The vacation proceedings were had in pursuance of chapter 84, Laws 1901, p. 175. The petition was signed by the owners of all private property actually abutting upon the portion of said street sought to be vacated, and was therefore sufficient under the requirements of § 1 of said act.

An important question arising on this appeal is whether the city of Hoquiam had authority to vacate said portion of H street without providing that respondents should first be paid such damages as their property, lot 16 in block 36, might

sustain by reason thereof. Appellants contend that respondents have sustained no damage whatever, or that, if they have, it is only of a character similar to that sustained by the public in general, differing only in degree. They further contend that only the owners of lots actually abutting upon the particular portion of the street vacated can recover damages, and then only for special injuries sustained by them, other than those sustained by the public in general; such, for instance, as damage by reason of loss of ingress to, or egress from, such abutting property. Respondents insist that, by reason of said vacation, their lots now front upon a *cul de sac*, instead of an open street, depriving them of direct access to Fifth street and points beyond; and that, by reason thereof, they have suffered special damage. They also contend that the vacation of said portion of H street is the result of collusion between appellants and said city; that said ordinance was passed for appellants' benefit only, and not for any general or public benefit; and they undertake in this action to inquire into the motives that actuated the city authorities in making such vacation.

The legislature has power to vacate streets, and may delegate such power to the municipal corporations of the state. Such delegation has been made by chapter 84, Laws 1901. Such power having been so delegated, the exercise thereof rests within the discretion of the municipal authorities, and being a political function, will not be reviewed by the courts except upon a clear showing of collusion or fraud. Respondents have pleaded collusion and fraud on the part of the city and appellants, but fail to sustain their allegations by evidence. It does, perhaps, appear that appellants will be benefited by such vacation, as they are proceeding to use the abandoned portion of H street for a large manufacturing plant. But the fact that such vacation has been made at their instigation, or that they are benefited thereby, is not sufficient to constitute such a fraud or abuse of discretion as, in the absence of any further showing, will authorize a court

of equity to interfere and declare the vacating ordinance to be void. *Knapp, Stout & Co. v. St. Louis,* 156 Mo. 343, 56 S. W. 1102. Elliott, in the second edition of his work on Roads and Streets, at § 879, says:

"Whether it is expedient to discontinue a highway is a question for legislative decision, and when the authority to discontinue is delegated to local officers, and no restrictions are placed upon its exercise, the officers are invested with a very broad discretion, and unless this discretion has been abused the courts cannot interfere. This is in accordance with the general rule that where officers are invested with discretionary power courts will not substitute their judgment for that of the officers invested by law with the right to decide upon the necessity or expediency of doing a designated act."

See, also, *Glasgow v. St. Louis,* 107 Mo. 198, 17 S. W. 743.

From the record before us we conclude, (1) that the petition for vacation was sufficient; (2) that the proceedings of the city authorities were in strict conformity to law; (3) that no fraud or collusion has been shown; and (4) that the city, having exercised its discretion in making said vacation, the courts should not interfere unless respondents are entitled to compensation for special damages sustained, and payment thereof, before said street is closed. Did respondents sustain such special damages as would entitle them to restrain the closing of said street until said damages may be ascertained and paid?

Their lot is on the corner of H and Sixth streets. They have ingress to and egress from the same, not only by the nonvacated portion of H street, but also by Sixth street. The evidence shows they have an outlet to the northwest portion of the city by going around block 36. They are not owners of property abutting on the vacated portion of H street, and even though a *cul de sac* has been formed, they are not within it, but at its entrance. There is some conflict of authority as to whether owners of lots not abutting upon that portion of a street actually vacated can recover damages. The current of authority seems to be against any such right of re-

covery, unless special damage is shown, as distinguished from that sustained by the public in general.

"Where a municipality attempts to vacate a street, property owners not abutting thereon have no grounds for objecting to the validity or regularity of the proceedings nor the right to an injunction restraining such vacation." 27 Am. & Eng. Ency. Law (2d ed.), 114, 115, and cases cited.

In *Heller v. Atchinson etc. R. Co.,* 28 Kan. 625, Brewer, J., at page 628, said:

"Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public; but in the case at bar, access to plaintiff's lots is in no manner interferred with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is, that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result. There is nothing to prevent travel from coming by her lots if the travelers desire it. The way to the heart of the city by her lots is a little more remote than it was before, but still free passage is open to all who wish to pass thereby. No one is compelled to stay away. Access to the lots is the same that it was before, so that the injury is only the indirect result of the action complained of, and it is an injury which, if it exists at all, is sustained by all other lots along the street west of the parts vacated."

In *Nichols v. Richmond,* 162 Mass. 170, 38 N. E. 501, the court says:

"The line has to be drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar, and different in kind from those suffered by the public at large. In the present case, although, owing to the proximity of her premises to the discontinued portion of the way, and to

the use which she made of them, the inconvenience and damage to the petitioner were greater than to others having occasion to use the way, the difference was one of degree, and not of kind."

See, also, *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355, 81 Pac. 840; Dillon, Munic. Corp. (4th ed.), § 666; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649; *Smith v. Boston*, 7 Cush. 254; *Stanwood v. Malden*, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 62 N. E. 341, 87 Am. St. 600. From the above authorities, and many others which might be cited, we conclude respondents are not entitled to recover damages for the vacation of said street, nor to enjoin such vacation, no collusion or fraud having been shown.

Appellants requested the court to find that respondents were not damaged in any sum by said vacation, and also that their property was not damaged. This request was refused, and we think such refusal was error. The evidence utterly fails to show any damage to appellants or their property. But even though it be conceded that any damage was sustained by them, it has been only of a character similar to that sustained by the public in general. The business portion of the city and respondents' place of business were towards the southeast, in an opposite direction from Fifth street. The portion of the street vacated was impassable for teams, had never been improved, had no sidewalk except two planks laid lengthwise which were rarely used. A short time prior to the passage of the ordinance, respondents had offered to sell their property for $1,000, but immediately afterwards refused $1,200. We fail to find any showing of special damage, and if any damage be conceded, it was only such damage as might have been also sustained by owners of property in other portions of the city, differing only in degree.

The trial court erred in enjoining the closing of said por-

tion of said street. The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

MOUNT, C. J., DUNBAR, HADLEY, RUDKIN, and ROOT, JJ., concur.

[No. 5813. Decided January 4, 1906.]

THOMAS J. WATKINS, *Respondent*, v. HENRY BALCH *et al.*, *Appellants*.[1]

FRAUDS, STATUTE OF—ORAL LEASE FOR TERM OF YEARS—PART PERFORMANCE. One who enters into possession of real property, under an oral lease for a term of years is a tenant from period to period in which the rent is reserved, and the tenancy may be terminated by the statutory notice before the end of each such period for which the rent is payable.

SAME—PERFORMANCE OF SERVICES AS PAYMENT OF RENT—NECESSITY OF SHOWING VALUE TO TAKE CASE OUT OF STATUTE. An oral lease for the term of five years, in consideration of the services of the tenant in caring for a flock of goats and the performance of labor in clearing the land and making improvements to the value of $100 each year, is within the statute of frauds and creates a tenancy from year to year, unless it is made to appear that the improvements increased the rental value of the premises; and a mere finding that improvements had been made to the extent of $300, is not sufficient to show that the tenants suffer any material injury as to such rental value.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered April 10, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of forcible entry and detainer. Affirmed.

W. H. Abel, for appellants.

J. A. Hutcheson, for respondent.

FULLERTON, J.—This is an action under the statute of forcible entry and detainer. On March 1, 1902, the respond-

[1]Reported in 83 Pac. 321.

ent and the appellants entered into an oral agreement whereby the respondent undertook to lease to the appellants certain farm lands, situated in Chehalis county, for a term of five years, in consideration that the appellants would, during that time, care for a flock of goats the respondent intended purchasing and putting on the land, and would perform work and labor in clearing and improving the land to the amount in value of $100 for each year during the term of the lease. Pursuant to this agreement, the appellants entered into possession of the property, and have since continued in such possession, during which time they have carefully cared for the goats, and have performed work and labor on the premises in the way of permanent improvements of the value required by the terms thereof. Some days prior to March 1, 1905, the respondent served written notice on the appellants to quit and surrender the possession of the premises on that date, it being the end of the third year of the term. The appellants refused to surrender such possession, whereupon the respondent brought this action to obtain such possession. He was successful in the court below, and the appeal is from the judgment in his favor.

The sole question presented by the record is the validity of the oral lease. The appellants concede that ordinarily an oral lease of real property for a longer period than one year is void under the statute of frauds, but they argue that, because of the peculiar nature of the rental they were to attorn for the use of the land, this case is differentiated from the ordinary oral lease where only a money rent is reserved, and presents equitable features which entitle the appellants to the full enjoyment of the term.

Were this the ordinary case of an oral lease for a fixed period with a yearly reservation of rent and a taking of possession thereunder, we would have no hesitancy in holding that it was a tenancy from year to year, as the statute itself provides that such is the effect of an oral lease, void under the statute of frauds, which has been thus partially per-

formed. The statute, after providing that all conveyances of real estate or interests therein, and all contracts evidencing any incumbrances thereon, shall be by deed, and that such instruments, other than a lease for a term not exceeding one year, shall be in writing signed and acknowledged by the party bound thereby, provides that, when premises are rented for an indefinite time, with monthly or other periodic rent reserved, such tenancy shall be construed to be a tenancy from month to month, or from period to period on which rent is payable, and shall be terminated by written notice of thirty days or more, preceding the end of any of such months or periods, given by either party to the other. An oral lease, therefore, where possession of the property has been taken, is not void in toto, but it may not be a lease for the term agreed upon. If the rent reserved is to be paid periodically it is a lease good for one of such periods, but subject to be terminated at the end thereof, or at the end of any other of such periods. Thus, under the statute, where one enters into the possession of real property under an oral lease for a definite time with periodic rent reserved, he is not a tenant for the time agreed upon, but a tenant from period to period, corresponding to the times on which rent is payable. Such a lease can be terminated, as the statute provides, by written notice given at the prescribed time before the end of such period. *Richards v. Redelsheimer,* 36 Wash. 325, 78 Pac. 934; *Evans v. Winona Lumber Co.,* 30 Minn. 515, 16 N. W. 404; *Morrill v. Mackman,* 24 Mich. 279, 9 Am. Rep. 124; *Arbenz v. Exley, Watkins & Co.,* 52 W. Va. 476, 44 S. E. 149, 61 L. R. A. 957; *Coudert v. Cohn,* 118 N. Y. 309, 23 N. E. 298, 16 Am. St. 761, 7 L. R. A. 69; *Rosenblat v. Perkins,* 18 Ore. 156, 22 Pac. 598, 6 L. R. A. 257; *Bard v. Elston,* 31 Kan. 274, 1 Pac. 565; 18 Am. & Eng. Ency. Law (2d ed.), 194.

On the other hand, the courts generally hold that, where there is an entry and the payment of rent in advance for a fixed term under an oral lease, the lease is good for an entire term, although the lease be a longer term than is permitted

by the statute; this on the principle that it would be permitting the statute to perpetrate, rather than prevent, frauds if thereunder a landlord may accept rent for a given term and then use the statute to evict the tenant before the end of such term. *Clark v. Clark,* 49 Cal. 586; *Morrison v. Herrick,* 130 Ill. 631, 22 N. E. 537; *Dunckel v. Dunckel,* 141 N. Y. 427, 36 N. E. 405.

It is this latter principle that the appellants seek to invoke in this case, but we think the finding of the court too meager to bring them within the rule. The evidence is not brought here in the record, and the facts must rest on the findings of the court. And while the court found that permanent improvements had been made on the premises to the value of $300, it did not find whether or not such improvements increased the rental value of the premises. It, of course, is inferable that such improvements would increase the rental value to some extent, but the amount is conjectural, and as the appellants are relying on an equitable principle, the burden was upon them to show that they would suffer some material injury if the ordinary rules of law were enforced against them. This, as we view the findings, they have not done, and we must hold that they were tenants from year to year, and subject to ouster at the end of each yearly period.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, HADLEY, CROW, and ROOT, JJ., concur.

[No. 5880. Decided January 5, 1906.]

CHARLES COOK, *as Guardian etc. of Joseph Cook, a Minor, Respondent,* v. STIMSON MILL COMPANY, *Appellant.*[1]

EVIDENCE—SPEED OF TRAIN—EXPERTS—OPINION OF A BRAKEMAN FROM CONDITIONS AFTER A WRECK—COMPETENCY. Brakemen or firemen of a few years experience on a logging road are incompetent to give expert evidence as to the rate of speed at which a logging train was running, merely from appearances of a wreck, when they were not present and did not see the accident, and their knowledge was not derived from observations of similar wrecks, and when the conditions were abnormal and did not relate to the ordinary operation of trains with which railroad men are presumed to be familiar.

APPEAL—FORMER DECISION—LAW OF CASE. Upon a second appeal of a cause the decision on the first appeal becomes the law of the case.

Appeal from a judgment of the superior court for Snohomish county, Joiner, J., entered April 29, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained while riding on a logging engine. Reversed.

Graves, Palmer, Brown & Murphy and *Robert A. Hulbert,* for appellant.

Cooley & Horan, for respondent.

RUDKIN, J.—This is an action to recover damages for personal injuries suffered by Joseph Cook, a minor, while riding on one of the defendant's logging trains. The case was before this court on a former appeal and will be found reported in 36 Wash. 36, 78 Pac. 39. We deem it sufficient to say, in addition to the statement of the case contained in the former opinion, that one of the grounds of negligence charged was that the train was running at an unusually high and dangerous rate of speed at the time of the accident, to wit, at the rate of forty miles per hour. The plaintiff had judgment below, and the defendant appeals.

[1]Reported in 83 Pac. 419.

At the time of the accident which caused the injury complained of, a logging train operated by the appellant, consisting of an engine, tender, and eight cars loaded with logs, was approaching one of its camps. As the train rounded a curve, the fireman, who occupied a position on the engine toward the inside of the curve, discovered some cattle on the track about one hundred feet ahead of the train. He immediately sounded the whistle and, by the time the engineer could see the cattle from his position on the engine toward the outside of the curve, the train was within about a rail's length of them. Believing that he could not stop the train before striking the cattle, and that any attempt on his part to do so would result in piling the logs from the cars on top of the engine, the engineer threw open the throttle in order to strike the cattle as hard as possible, deeming this the safest and best course under the circumstances. When or soon after the train struck the cattle, the forward trucks of the engine, the trucks of two of the cars, and one of the trucks of a third car left the rails. The engineer kept the engine moving ahead as best he could, to prevent the logs from piling on top of the engine. After the train had proceeded from 500 to 700 feet from where it struck the cattle, it stopped, the logs forced the tender up against the engine and crushed the respondent's foot or leg, causing the injury which constitutes the subject-matter of this controversy.

One of the controverted questions at the trial was the rate of speed at which the train was moving at the time the cattle were discovered on the track, the appellant claiming that the train was running from 12 to 15 miles an hour, the respondent claiming that the rate of speed was much higher. To prove the rate of speed, the respondent called two witnesses, neither of whom was present or saw the accident. The witness Friermood was in the employ of the appellant for about eight months in all—how long prior to the accident does not appear. His experience in railroading is shown by the following an-

swer to a question propounded to him: "I was working in the shops for a while, I fired engine a while, and I was breaking a while." Between the time of the accident and the second trial of the case, the witness was in the employ of the Northern Pacific Railroad Company for a period of about two and one-half years in the capacity of brakeman. The following are some of the questions propounded to this witness on his direct examination, together with the objections thereto, the court's rulings, and the answers given:

"Q. What was the condition that you found there of the logs upon the first set of trucks back of the engine? A. When I got down there, I found they had shifted forward and shoved the tank into the cab, and some of them were as far as the front of the engine. Q. How do you mean— A. Shoved by the tank. Q. Pushed right by? A. Right by the tank, and as far as the front of the engine. Q. What would that indicate, if anything, as to the speed at which the train was going previous to the time when it was stopped, or at the time when the cattle were struck? Mr. Graves: Objected to upon the ground that the witness has not shown himself competent to answer such a hypothetical question or give an opinion upon those facts. Overruled. Defendant excepts. A. It looks to me like the speed would be rather swift down there; engine started suddenly and the logs shifted that way. Q. From the conditions that you found existing there at the time when you went down to the wreck, the distance which the train had apparently run after striking the cattle, and the general condition in which you found it, could you form any opinion as to the rate of speed at which that train was running when it jumped the track? A. Well, I should think that— Mr. Graves: Just answer yes or no. Q. Yes; as to whether you can give an opinion. A. Yes, sir, I can give an opinion. Q. What, in your opinion, was the speed at which that train was running at the time when the cattle were struck? Mr. Graves: We object to that, may it please your honor, that the witness has not shown that he is in any manner qualified to give an opinion upon such a state of fact, and that his opinion would be entirely valueless as to what the rate of speed might have been. Overruled. Defendant excepts. A. In my opinion, the speed was about thirty miles an hour. Q. Now, in your opinion, was

that a safe rate of speed to maintain in coming down that grade? A. No, sir. Q. Would the engineer have his engine under control going at that rate of speed? A. No, sir; not with a logging train. Mr. Graves: We move to strike out this last answer and question the witness answered, upon the same ground as our objection to the questions above, that the witness is not competent to express an opinion, and the further reason that there is no one would be competent to express an opinion from such facts as this witness saw. The Court: Motion denied. Defendant excepts."

The experience of the witness Davis was about the same as that of the former, excepting that he was a fireman, instead of a brakeman. His testimony, with the objections thereto, was as follows:

"Q. What, in your judgment, was the rate of speed at which that train was running when it jumped the track? Objected to upon the ground that the witness is not competent, and there are no facts in the case or stated in the question that would enable a witness to form an opinion that would be of any value as evidence in this case. Overruled. Defendant excepts. A. I should think thirty or thirty-five miles an hour."

It seems to us that the foregoing testimony was incompetent and should have been excluded. It either requires no expert knowledge to enable one to draw an inference as to the rate of speed of a train from the conditions surrounding a wreck caused by it, or the witnesses in this case were not shown to possess such expert knowledge. In the former case, any inference to be drawn was for the jury alone, and the testimony would be incompetent. In the latter case the witnesses themselves were incompetent and their testimony should have been excluded. Furthermore, all the conditions attending upon the stopping of the trains were not known to the witnesses, nor were they embodied in the questions propounded to them. Whether an effort was made to stop the train, or whether it was thrown full speed ahead, and whether all the trucks left the track at the same time, would necessarily have an important bearing on the wreckage produced

by the stoppage of the train; and yet, these facts were wholly unknown to the witnesses and were not taken into consideration by them in forming the expert opinion. The question here involved was not the rate of speed of a train which a witness sees in motion, and has an opportunity to observe, nor the distance in which a train may be stopped under ordinary conditions, nor any other question relating to the ordinary operation of trains, or the duties of trainmen, with which railroad men are presumed to be familiar. The conditions were abnormal and unusual, and it certainly cannot be said that a few months experience around a logging camp, or a couple of years experience in braking or firing, of itself, qualifies one to express an opinion in such a case. If expert testimony is competent at all to establish the rate of speed in a case like this, such testimony must come from witnesses whose knowledge is derived from the observance of similar wrecks under similar circumstances, where the witnesses are familiar with the causes which produced them.

In *Northern Pac. R. Co. v. Hayes,* 87 Fed. 129, the trial court permitted a person struck by a train to state his opinion as to the rate of speed of the train which struck him at the time of the accident. The circuit court of appeals held that this was error, saying:

"The speed of the train which backed into the yard that night, and which struck the plaintiff, was a material question at issue, and much disputed on the trial. The plaintiff did not see the train at all. He was walking in the same direction, ahead of it, and was struck in the back, and thrown, he thinks, 20 or 30 feet; and he says he was never struck by a train before in that way, and had nothing to judge of as to the speed, except that one blow. Nevertheless he was allowed, against the defendant's objection, to give his opinion of the speed of the train, which he says was very fast, and, he would judge, between 15 and 20 miles an hour. We think this was error. He was simply guessing at the distance he was thrown, and from this, and from the force of the blow on his shoulder, he guessed at the speed of the train. It can hardly be assumed that the jury would not be influenced in

any degree by such testimony. Indeed, the very fact that it was held competent, and permitted to be given to the jury, would naturally be taken by them as a warrant that some credit might or should be given to an opinion so poorly founded. It is elementary that the admission of illegal evidence over objection necessitates a reversal. *Waldron v. Waldron,* 156 U. S. 380, 15 Sup. Ct. 383, and cases cited. In order that the court may not disturb a judgment for error, it should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party objecting. *Railroad Co. v. O'Reilly,* 158 U. S. 337, 15 Sup. Ct. 830."

And yet it would seem that a person struck by a moving train could form as accurate an opinion as to the rate of speed as the witnesses in this case, who simply viewed the wreck. In *Hellyer v. People,* 186 Ill. 550, 58 N. E. 245, it was held error to permit physicians to testify as to whether certain injuries could have been inflicted by a railroad train, running at the rate of thirty-five miles per hour. In *Chicago etc. R. Co. v. Lewandowski,* 190 Ill. 301, 60 N. E. 497, it was held improper to permit railroad men or others to testify that a person could or could not be struck by a freight train running at the rate of twenty-five or thirty miles per hour and survive. In the former case the court said:

"The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a correct judgment. In regard to such matters experts are not permitted to state their conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge and generally think alike. Not so in matters of common knowledge. *(Milwaukee and St. Paul Railway Co. v. Kellogg,* 94 U. S. 469.) 'Whenever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education moving in the ordinary walks of life, the rule is that the opinions of experts are inadmissible, as the jury are supposed in all such matters to be entirely competent to draw the necessary inferences from the facts testified of by the witnesses.' (Rogers on Expert Testimony, Sec. 8; *Ohio and Mississippi*

Railway Co. v. Webb, 142 Ill. 404.) As a general rule, the opinions of witnesses are not to be received in evidence merely because such witnesses may have had some experience or greater opportunities of observation than others, unless such opinions relate to matters of skill and science. *Robertson v. Stark,* 15 N. H. 109; *Marshall v. Columbian Ins. Co.,* 7 Fost. (N. H.) 157; *Protection Ins. Co. v. Harmer,* 2 Ohio St. 452; *People v. Godine,* 1 Denio, 281; *Westlake v. St. Lawrence etc. Ins. Co.,* 14 Barb. 206; *Smith v. Gugerty,* 4 Barb. 614; *Folkes v. Chudd,* 3 Doug. 157; 1 Smith, Lead. Cas. (5th Am. Ed.), 630; *Daniels v. Mosher,* 2 Mich. 183."

In *Briggs v. Minneapolis St. R. Co.,* 52 Minn. 36, 53 N. W. 1019, the courts says:

"Courts have gone far enough in subjecting life, liberty, and property to the mere speculative opinions of men claiming to be experts, and we are not disposed to extend the rule into the field of mere hypothetical conjecture, which, in the case like the present, must necessarily have been so uncertain and unreliable as to be purely conjectural, and utterly unsafe for either court or jury to adopt."

See, also, the following cases: *Hopper v. Empire City Subway Co.,* 79 N. Y. Supp. 907; *Culbertson v. Metropolitan St. R. Co.,* 140 Mo. 35, 36 S. W. 834; *Smith v. Minneapolis St. R. Co.,* 91 Minn. 239, 97 N. W. 881; *Hammerberg v. Metropolitan Street R. Co.,* 62 Mo. App. 563; *Koehler v. New York Steam Co.,* 75 N. Y. Supp. 597.

All the other errors discussed were before this court on the former appeal. There is substantially no difference in the facts disclosed at the two hearings, and the former opinion has therefore become the law of the case as to all questions there decided. For the error in the admission of testimony the judgment is reversed and a new trial ordered.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and DUNBAR, JJ., concur.

ROOT, J., having been of counsel, took no part.

[No. 5621. Decided January 5, 1906.]

SOPHIA EKSTRAND, *Respondent*, v. A. BARTH *et al.*, *Appellants*.[1]

PLEADINGS — BREACH OF BUILDING CONTRACT — COMPLAINT — CERTAINTY. It is not error to refuse to order a complaint for breach of a building contract to be made more definite and certain where it contained a copy of the specifications in full and alleged the substance of the contract.

DAMAGES—BREACH OF BUILDING CONTRACT—SALE OF PREMISES BEFORE SUIT. Damages sustained by the owner of premises by reason of the contractors' breach of a building contract are personal to the owner and do not abate upon a sale of the premises before suit.

CONTRACTS—FOR BUILDING HOUSE—DAMAGES FOR DEFECTS—PAYMENT AND ACCEPTANCE—ESTOPPEL—NO KNOWLEDGE OF DEFECTS. The owner of premises is not estopped to recover damages for the defective construction of a building by the acceptance of the work and a settlement with the contractors and by the fact that she was present during the progress of the work, where it appears that she was inexperienced and had no knowledge of the defect until after payment had been made, and relied upon the contractors as friends to properly build the house.

APPEAL—TRIAL DE NOVO—EVIDENCE—HARMLESS ERROR. The admission of improper evidence in a case tried before the court without a jury is harmless.

CONTRACTS—EVIDENCE—BUILDING INSPECTOR'S APPROVAL OF LOCATION OF BUILDING ENCROACHING UPON STREET—COMPETENCY. In an action for damages against contractors for improperly building and locating a house partly in the street, evidence that the city building inspector approved the building, is incompetent where it is admitted that the building encroached upon the street contrary to the terms of the defendants' contract to properly locate it.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 17, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a building contract. Affirmed.

Charles A. Riddle, for appellants.

Larrabee & Wright, for respondent.

[1] Reported in 83 Pac. 305.

MOUNT, C. J.—Respondent brought this action in the court below to recover from appellants damages alleged to have been caused by the faulty construction of a building in Seattle. The cause was tried to the court without a jury. Findings were made in favor of the plaintiff below, and a judgment entered in her favor for the sum of $648. Defendants have appealed.

The facts are, in substance, as follows: On the 10th day of July, 1902, respondent and appellants entered into a written building contract, whereby appellants agreed, for the consideration of $5,300, to furnish the material and construct for respondent, "in the best, most substantial, and workmanlike manner," and to her satisfaction, a frame building, consisting of four flats, on lot 1 in block 12 in Eastern addition to the city of Seattle, according to certain plans, specifications, and drawings attached to the contract and made a part of it. These plans, specifications, and drawings were made by one of the appellants, who was an old friend and acquaintance of the respondent. The superintendence of the work was left to the appellants, upon whom respondent relied. Soon after the execution of the contract, appellants proceeded to grade down the lot and to construct the building thereon.

Respondent stated to appellants that she wanted the building placed on the lot as near the street as was possible. There is some dispute as to whether the appellants undertook to locate the building on the lot where it was placed without the advice of the respondent. The respondent testified that she did not know the location of the lot lines, and was assured by one of the appellants that he knew the lines, that he had much experience in locating lot lines, and that he would place the house where it should be placed; while appellants testified that respondent herself gave directions where the house should be placed. We are inclined to follow the lower court upon this question, and believe the respondent's statements in this regard. The house was located on the lot in such a manner that the front porch extended about two and one-half

feet over the line of the lot, and upon the inside parking strip between the lot line and the sidewalk along the street.

During the time the building was in course of construction, the respondent was there frequently, and saw the work as it progressed. She saw nothing wrong about it and made no complaint, but authorized some minor changes in the specifications as extras. She was satisfied with the work as it appeared to her. About two weeks before the building was completed, she moved into one of the flats, and continued to reside there until the time of the trial. She paid for the work from time to time as demands were made upon her by the appellants. About October 28, 1902, the building was finished, and on that day a settlement was made of the accounts between the parties, and the full contract price of the building was paid by respondent to the appellants, and in addition thereto extras were paid for to the amount of $42.82, leaving a balance of $7.98 due the appellants.

Soon after this settlement was made, leaks began to appear in the roof of the building, the plastering became wet and broke and fell in places, the foundation settled and cracked, the doors sagged, the windows leaked rain into the house, and a cement floor turned water into the basement instead of away from it; and the respondent also learned that the house projected into the street, and she was notified by the city authorities to remove it. She thereupon called the attention of the appellants to these conditions, and they attempted to repair the roof and other defects, but without success. On February 7, 1903, respondent sold and conveyed the premises to her son, and thereafter, on May 7, 1904, brought this action to recover damages from appellants on account of failure to construct the building in the best, most substantial, and workmanlike manner.

Appellants first contend that the trial court erred in denying a motion to require the respondent to set out the contract in her complaint, and to make several paragraphs more definite and certain. The complaint contained a copy of the specifica-

condition of the roof, of the windows, of the foundation, and of the fact that the front porch extended into the street, after the payments had been made. In fact it appears that she was a personal friend of the appellants, and gave the contract to them for that reason, and relied entirely upon them to build the house in accordance with the contract therefor, and relied upon their promise to make good any defects therein. Under these circumstances, her payment of the contract price and her occupancy of the building cannot be held to be an acceptance of the work such as to estop her from claiming damages.

Appellants complain because the court admitted certain evidence which is claimed to have been erroneously admitted, and rejected certain evidence which should have been received. In cases tried to the court without a jury, we have frequently held that the reception of improper evidence is not reversible error, because the case is tried here *de novo* and such evidence will not be considered. The evidence offered by appellants, and rejected by the court, was to the effect that the plans of the building showing the location of the building with reference to lot lines were filed in the office of the building inspector of the city of Seattle, and that the building inspector examined the premises and approved the building. It was admitted that the building encroached upon the street. The evidence offered was therefore clearly immaterial. Furthermore, it is not contended that the building inspector was authorized to permit buildings to be placed so that they would encroach upon the street, and even if he had such authority, the respondent had a right to have her building placed upon the lots as appellants had agreed to place it.

Appellants contend that the findings and conclusions of the lower court are not supported by the evidence, but after carefully examining the evidence, we think the findings are supported thereby. There is much conflict between the statements of the witnesses on the material points, but we think

the court properly found the facts in the case and arrived at substantial justice between the parties.

The judgment is therefore affirmed.

ROOT, HADLEY, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 5812. Decided January 5, 1906.]

A. H. CLAMBEY, *Respondent,* v. JENNIE CORLISS, *Appellant.*[1]

APPEAL — REVIEW — OBJECTIONS TO PLEADINGS — TRIAL ON AGREED FACTS. Where a case is tried upon an agreed statement of facts, objections to the pleadings may be eliminated from the case on appeal.

MORTGAGES — CONSTRUCTION — WHETHER COLLATERAL OR ORIGINAL UNDERTAKING—RELEASE BY CHANGED RELATION OF PRINCIPAL. Where mortgages are executed pursuant to a tripartite agreement, whereby the mortgages were given by two of the parties to the third party, and the mortgagee agreed to pay stated sums to each mortgagor, it cannot be claimed by one of the mortgagors that he executed his mortgage as a surety mortgage, when the contract contains no reference to such suretyship and it was stipulated that certain liens against his land should be discharged, and there were other direct considerations moving to him, and it was one entire transaction; hence his mortgage would not be discharged by changed relations between the other two parties to the agreement.

Appeal from a judgment of the superior court for Island county, Hatch, J., entered February 17, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

George McKay, for appellant.

S. S. Langland and *S. D. King,* for respondent.

HADLEY, J.—This action was instituted to foreclose a mortgage upon real estate. One of the defendants, Jennie Corliss, interposed a defense. She became the holder of the mort-

[1]Reported in 83 Pac. 422.

gaged land by virtue of a quitclaim deed executed by the mortgagor subsequent to the giving of the mortgage. In her answer she avers that the plaintiff has released and discharged the mortgage. The cause was tried upon an agreed statement of facts which showed that, on April 24, 1902, the plaintiff in the action and the defendants C. W. Corliss and the Patentee's Manufacturing Company, a corporation, entered into a tripartite written agreement. By the terms of that agreement, the plaintiff agreed and promised to pay to the other two parties to the agreement the sum of $5,200, of which sum the agreement states $1,000 was to be paid to one Cantrell for a purpose specified, but not stating on whose account or for whose obligation it was to be so paid. It was also specified that such portion of the $5,200 as should be necessary for the purpose should be applied to the discharge of all liens or claims against certain lands of said C. W. Corliss. All of the balance of the $5,200 was to be paid into the treasury of said Patentee's Manufacturing Company to carry on its work of manufacturing. The agreement also provided that the plaintiff should assign to said C. W. Corliss all of plaintiff's stock in the Snoqualmie Boom Company.

In consideration of the plaintiff's part of said agreement, viz., the payment of the $5,200 and the assignment to said Corliss of the said stock, the corporation agreed to issue bonds in the sum of $10,000, secured by a first mortgage on all its property, and that it would deliver to the plaintiff bonds in the sum of $6,000. Said Corliss also agreed that, to secure said $6,000 of bonds, he would execute a mortgage to plaintiff upon certain land, and would also assign to him fifty-five thousand shares of the capital stock of said corporation. Said agreement was fully carried into effect, and the mortgage given by Corliss in pursuance of the agreement is the one now sought to be foreclosed. Thereafter the said corporation was insolvent and unable to meet its obligations, and it entered into an agreement with creditors, including the plaintiff, whereby it transferred all its property to one Camp-

bell, as trustee. In pursuance of the trust arrangement, the trustee sold the property and distributed the proceeds as provided in the agreement. The trustee paid to plaintiff $898.75, to be applied upon the indebtedness represented by said bonds. It is stipulated that no release of the mortgage in suit was ever demanded, and that no release has ever been made, unless the facts agreed upon amount in law to a release.

The court found that $146.69 was paid by the trustee to unsecured creditors and that, as the plaintiff has an interest in the company's first mortgage upon all its assets securing the bonds to the extent of six-tenths thereof, that portion of said last named sum should, therefore, have been applied to reduce the amount of plaintiff's claim as secured by the mortgage in suit, and it was accordingly so reduced. The plaintiff was awarded foreclosure for the unpaid balance, according to the terms of the mortgage. The defendant Jennie Corliss has appealed.

Appellant in her answer simply alleges that the plaintiff has released and discharged the mortgage. No other affirmative allegation appears in the answer. She does not contend that any release was ever entered of record, or that any other direct and specific release was made between the parties. Her contention is that the mortgage was given as a collateral or surety obligation only, to secure the debt of another owing to the plaintiff, and that she, as the holder of the land, is entitled to urge the release of the mortgage as a surety obligation through operation of law, by reason of certain acts of the mortgagee done with the consent of the principal debtor. The facts upon which she bases her claim that the mortgage has been released are not pleaded in her answer. Inasmuch as she seeks to raise the question of suretyship, the respondent suggests that she has not sufficiently brought that matter into the issues made by the pleadings. In view of the statutory provision found in Bal. Code, § 5707, it might be so argued; but as the case was tried upon an agreed

statement of facts, we shall eliminate that subject from our discussion of the case.

Appellant in her argument concedes that the questions raised by her are reducible to one, viz., was the plaintiff's mortgage discharged by reason of the facts? Her contention is that the mortgage given by Corliss, her grantor, was only a surety obligation given to secure the debt of the Patentee's Manufacturing Company. She urges that the transfer of the assets of that insolvent corporation to a trustee, the subsequent sale thereof, and the application of the proceeds upon the debt secured by its mortgage, without foreclosure of the latter, should be held to have discharged the mortgage in suit. She does not allege, and it is not shown, that the sale of the assets was not for reasonable value, or that she has been injured by a sale for an inadequate sum. She only contends that the mortgage is a surety contract, and that the contractual relations have been so modified and changed that the surety has been released.

From the stipulated facts we do not think it should be held that the mortgage sustained the mere relation of a surety to the original transaction. The written agreement which led to the making of this mortgage states that it was made with both the manufacturing company and Corliss, and no reference is made to the former as a principal or to the latter as a mere surety. It is drawn in form as an ordinary joint agreement, making no distinction as to the obligation of one from the other. It recites that the plaintiff agreed to pay both parties, not to the company only, $5,200. More than that, it specifically recites that a part of the money, the amount not specified, should be used to pay liens and claims against the land of Corliss. That was a direct consideration moving to Corliss and for his benefit. It also recites that the respondent should assign certain boom company stock to Corliss. With these specified considerations moving to Corliss, he agreed to, and did, execute the mortgage in suit.

The respondent's relation to the matter was simply that he agreed to pay, and did pay, to both the other parties $5,200, and he also assigned the boom company stock to Corliss. It was to respondent a single and entire transaction, and he was to receive, and did receive, in return for what he paid and assigned, bonds of the corporation in the face sum of $6,000, secured by the company's mortgage on its assets, and by the Corliss mortgage on this land. We therefore think the Corliss mortgage was not collateral to the other, and that it was not intended as mere surety for the other, but that it was as much primary security to respondent as was the company's mortgage. There were simply two mortgages given by different parties to secure the same thing, viz., the payment of the money furnished by respondent and the value of the assigned boom company stock. Both mortgagors were beneficially interested in the thing secured. The company's mortgage secured $4,000, in addition to the $6,000 held by respondent; but the Corliss mortgage secured nothing but the $6,000, which he agreed to secure and which amount the agreement says was to be paid to both him and the company. Neither mortgage was collateral, but each was original, since it was made in consideration of a benefit and advantage peculiar to the mortgagor. Stearns, Law of Suretyship, § 39.

Since we view the relations of the parties as above stated, it is unnecessary for us to discuss other questions relating to the defense of suretyship, which have been discussed in appellant's brief. We think it was not error to decree foreclosure of the mortgage, and the judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, RUDKIN, and DUNBAR, JJ., concur.

[No. 5756. Decided January 5, 1906.]

E. A. McKenna *et al.*, *Respondents*, v. George M. Cosgrove, *Appellant*.[1]

Executors and Administrators—Resignation—Appointment of Successor—Validity—Collateral Attack. Where an administrator has tendered his resignation and the same has been accepted and a new administrator has been appointed, the last appointment cannot be collaterally attacked by reason of the fact that the first administrator did not render any account.

Same—Sale of Real Estate to Pay Debts—Petition—Nonexistence of Personal Property—Showing—Sufficiency. Although the petition for the sale of real estate for the purpose of paying debts of the estate does not state that there was any personal property belonging to the estate, it will be presumed, in aid of the jurisdiction, after the confirmation of the sale, that the court was advised that there was no personal property which could have been applied to the payment of debts, there being no affirmative showing to the contrary.

Same—Petition—Necessity of Sale. Upon a collateral attack of a sale of real estate for the purpose of paying the debts of the estate, which real estate was specifically devised, it will be presumed in aid of the proceedings that there was no other real estate belonging to the estate, where the petition for the sale states that the lot in question was the only property belonging to the estate, although another lot was included in the inventory; and oral evidence that such other lot belonged to the estate was properly excluded.

Executors and Administrators—Power to Mortgage Estate—Execution in Representative Capacity—Presumption. An administratrix having authority to mortgage property of the estate under certain conditions, a new mortgage executed by her in her representative capacity will be presumed regular, nothing to the contrary appearing, and the court having known thereof and approved the application of the proceeds of such note and mortgage.

Same—Sale to Pay Debts—Confirmation—Regularity—Bona Fide Purchaser—Collateral Attack. An administrator's sale for the purpose of paying the debts of the estate, confirmed by the court, free from fraud, and shown to be valid on the face of the record, cannot be collaterally attacked for irregularities, as against a *bona fide* purchaser.

[1]Reported in 83 Pac. 240.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered January 4, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, enjoining a sale of land under execution and removing cloud from title. Affirmed.

Merritt & Merritt, for appellant.

H. N. Martin and *J. T. Mulligan*, for respondents.

HADLEY, J.—This action was brought to enjoin a sale of real estate under execution, and to remove a cloud upon the land by reason of a judgment and attachment. The following facts appear in the record: In April, 1897, one James Holmes was the owner of lot 8, block 17, in the city of Sprague, Lincoln county. During said month he died, leaving a will with codicil attached, and by the terms of the codicil he specifically devised to his wife, Lizzie Holmes, the said lot, and nominated her as the executrix of his will. The will was duly admitted to probate, and Mrs. Holmes was appointed as executrix, and was duly qualified as such. Thereafter she petitioned the court for an order to sell personal property of the estate. An order authorizing such sale was entered by the court, and by the terms of the order the executrix was directed to apply the proceeds arising from the sale to the payment of physician's accounts, aggregating $133, and the balance to the payment of such other debts "as may exist against said estate."

The record shows also that said Lizzie Holmes, in her capacity as executrix, executed a mortgage upon the aforesaid lot to Minnie Brunneman, to secure a note for the sum of $500, also executed by her as executrix. It is also disclosed that said executrix presented to the court her written resignation as executrix, because of her removal from the state, and requested the appointment of one T. M. Cooper. Thereafter, on the petition of said Cooper, he was appointed as administrator of said estate, and entered upon the discharge of his duties as such. Thereupon said Cooper, as administrator, petitioned

the court for an order to sell said lot for the purpose of paying obligations of the estate. Such an order was made after due notice to show cause and, in pursuance of the order, the administrator sold the lot to E. A. McKenna, as the highest bidder, for the sum of $800. The sale was thereafter duly confirmed by an order entered by the court.

In reporting, by final account to the court, the application made of the proceeds of the sale, the administrator showed that of the sum received $710 was paid to discharge the mortgage aforesaid, and the balance was applied upon payment of expenses of administration. After due notice the court, upon examination of the account and vouchers, fully approved the account. Meantime, prior to said sale proceedings, George M. Cosgrove, in a suit then pending against said Lizzie Holmes, caused an attachment to be issued and levied upon said lot. After the sale, a judgment was rendered against Mrs. Holmes in said action. An execution was then issued under said judgment, and placed in the hands of J. H. Gardner, as sheriff of Lincoln county. Claiming to act under authority of such execution, and by direction of said Cosgrove, the said sheriff attempted to levy upon said lot, and advertised the same for sale for the purpose of satisfying said judgment.

This action was then brought by said McKenna and his wife to enjoin the making of such sale, and to clear the lot of the cloud cast upon it by said attachment, execution, and levy. Said Cosgrove and the sheriff were made parties defendant, and the former answered the complaint, alleging that, at the time the administrator made the sale aforesaid, there were no debts against said estate; that the sale was unnecessary, and that it was made for the sole purpose of defrauding said Cosgrove and preventing the collection of his said judgment against Lizzie Holmes. The cause was tried by the court, and a judgment was rendered in favor of plaintiffs, permanently enjoining the defendants from selling said lot under said execution, and removing the cloud cast upon

the lot by reason of said attachment, execution, and levy. The defendant Cosgrove has appealed.

It is first contended that the appointment of Cooper as administrator was void, and that all his acts in the premises were nullities. The argument in support of this contention is that, at the time of Cooper's appointment, Mrs. Holmes was still the duly qualified and acting executrix of the estate; that she had never made a final accounting, and had never been discharged from her trust. Appellant's own pleading, however, shows that she did tender her resignation in writing, and the appointment of Cooper followed. There is no evidence in the record which shows affirmatively that Mrs. Holmes did not render a final account, or that she was not duly and regularly discharged. The court had jurisdiction of both the estate and of the executrix. The order appointing her successor has the solemnity of a judgment, and when collaterally attacked, as it is here, every fact necessary to support the order and which is not actually negatived by the record, will be presumed in its favor. *Kalb v. German Sav. & Loan Society,* 25 Wash. 349, 65 Pac. 559, 87 Am. St. 757; *Peyton v. Peyton,* 28 Wash. 278, 68 Pac. 757.

It is next urged that the court was without jurisdiction to order a sale of the real estate, and that the order of sale was void. It is contended that the petition for the sale was defective in that it did not show the amount of personal property which had come into the hands of the executrix, the predecessor of the administrator. The petition does state, however, that at the time of the appointment of the administrator, there was no personal property belonging to the estate. Other portions of the record of the estate show that the executrix sold personal property, and was directed by the court to apply the proceeds upon payment of debts of the estate. The sale having been made under direction of the court, and the court still having jurisdiction of the estate, when it considered the administrator's petition, it must be presumed here, in aid of the proceedings, in the absence of

positive facts appearing in the record to the contrary, that the court was advised that there was no personal property of the estate which had not already been properly applied. There is no affirmative showing here that there was personal property of the estate which had not been properly applied to the payment of debts, as was true in *Wallace v. Grant,* 27 Wash. 130, 67 Pac. 578, cited by appellant.

The next point made by appellant is that the petition for the order of sale was defective, for the reason, as alleged, that it did not show the amount of real property of which the testator died seized. It does state, however, that the only property belonging to the estate was the lot in question. It will be remembered that this lot was specifically devised to Lizzie Holmes, and it is as her property that appellant seeks to sell it in satisfaction of his judgment against her. He therefore seeks to make it appear that there was other real estate not specifically devised, which should have been sold first for the satisfaction of debts of the estate. We find no competent showing in this record that there was any other such real estate. The executrix seems to have included one other lot in an inventory, but the inventory shows upon its face that it was signed by her at Salt Lake City, Utah, and she was doubtless then of the opinion that the lot belonged to the estate; but the mere inclusion of the lot in the list does not establish that the estate had title to it. A witness also testified orally at the trial of this case that he understood that the lot belonged to the deceased. But such evidence is wholly incompetent to establish that the estate had title to the lot. There are, therefore, no competent facts appearing in the record which negative the statement in the petition that the lot in question was all the property belonging to the estate; and, in aid of the proceedings against this collateral attack, it must be presumed that there was no other real estate.

It is argued that the debt which was secured by the mortgage that was satisfied from the proceeds of the sale of the

lot was not the debt of the estate, but was the personal debt of Lizzie Holmes, and that the purpose of the appointment of Cooper as administrator and the subsequent sale of the lot through the probate proceedings was to defraud appellant and prevent him from collecting his debt against Mrs. Holmes. It is true the mortgage was executed after the death of her husband, but Mrs. Holmes executed both the note and mortgage in her representative capacity as executrix, and there is nothing appearing in the record which shows that it was not done to serve in some manner the interests of the estate. Upon the face of the note and mortgage they were such obligations of the estate as should have been discharged out of its assets. Authority for the executrix to mortgage the real estate is conferred by Bal. Code, § 6257, under conditions there specified. The record shows that the court was advised of the existence of the mortgage and approved of the application of the proceeds of the sale to its payment. In the absence of anything in the record affirmatively showing the contrary, it will therefore be presumed that the mortgage was regularly and authoritatively executed in behalf of the estate.

Fraud is not established by the record or the evidence, and with the above facts appearing, together with the court's order confirming the sale, the proceedings are not shown by the face of the record to have been void, and their regularity is not subject to attack in this collateral manner as against a *bona fide* purchaser. *Ackerson v. Orchard,* 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; *Otis Bros. & Co. v. Nash,* 26 Wash. 39, 66 Pac. 111; *Hubermann v. Evans,* 46 Neb. 784, 65 N. W. 1045; *Phillips v. Phillips,* 13 S. D. 231, 83 N. W. 94; *Hahn v. Kelly,* 34 Cal. 391, 94 Am. Dec. 742. It is not shown that respondents were not purchasers in good faith. They paid in cash the adequate value of the property, relying upon the probate proceedings and the authority of the administrator to sell, together with the court's order confirming the sale. The proceedings not appearing to have been void, re-

spondents took the land from the estate free from any claim of lien or charge against it by appellant for the personal obligation of Mrs. Holmes.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5889. Decided January 5, 1906.]

CHARLES A. WILLIAMS, *Respondent*, v. BALLARD LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE CAUGHT IN COGWHEELS — CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. A planer-man who is in a kneeling position with head and shoulders under a planer, a large and dangerous machine, is not guilty of contributory negligence, as a matter of law, in suddenly throwing his hand into unguarded cogs, known to him, in an effort to get from under the machine, in momentary forgetfulness of the danger, when a fellow servant starts the machine in motion without giving him any warning.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE. Contributory negligence is a question for the jury if men might properly differ as to whether the plaintiff had acted as a man of ordinary prudence would have done under the same circumstances.

SAME — PROXIMATE CAUSE — EXPOSED CONDITION OF COGWHEELS A CONTRIBUTING ELEMENT—LIABILITY OF MASTER. The maintenance of a planer with exposed cogs which could have been easily covered, and with defects whereby the cogs were likely to start automatically upon application of the idler, is the proximate cause of an injury to a planer-man who was injured thereby, while cleaning out under the machine, although the negligence of a fellow servant, who started the machine without giving any warning, contributed to the result; and such contributory cause does not relieve the defendant from liability.

SAME—ASSUMPTION OF RISKS—UNKNOWN DANGERS—DEFECTS IN MACHINE CAUSING UNEXPECTED STARTING—QUESTION FOR JURY. A planer-man who has worked upon a planer but five days and has no knowledge of a defect whereby the cogs may start automatically upon

[1]Reported in 83 Pac. 323.

the application of the idler, does not assume the risk from injury resulting from the known unguarded condition of the cogs, where there was ample time for him to have avoided the injury if the cogs had not automatically started.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 5, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by a planer-man caught in unguarded cogwheels. Affirmed.

G. M. Emory, for appellant.

James McNeny and *S. H. Steele,* for respondent.

Root, J.—Respondent recovered a judgment of $1,075 in the superior court for damages occasioned by having his hand crushed between the cogwheels on the side of a planer in the mill of appellant for whom he was working. The facts as admitted and revealed by the evidence were about as follows: The machine upon which the plaintiff was injured is known as a Hoyt planer, number 11, and consists of an iron frame or bed nearly fourteen feet long. The bed of the machine is three feet four inches wide, and two feet four inches above the ground; upon the bed of the machine are three sets of rollers, each set consisting of two steel cylinders, one placed above the other, the function of which is to carry the lumber through the machine and hold it in place against the planing knives; the first set of rolls are about five feet away from the front of the machine where the feeder stands. The distance between the first set of rolls and the second set of rolls is two and one-half feet; the distance between the second and the last set of rolls is about four feet. It is between the last named sets that the knives which plane the boards are situated. Each set of rolls is equipped with four cogs geared together in such a manner that they revolve, thereby causing the rolls to turn. These cogs are nine inches in diameter, and each pair of the left-hand cogs is so arranged as to afford an opening as much as six inches, so as to accommodate a piece

of lumber of that thickness; these are known as expansion gears.

The planer in question lay east and west in the mill, the operator standing in front of the machine at its east end. At the northwest corner of the planer were the cogs upon which the plaintiff was injured. Near the rear or west end of the machine, the plaintiff was kneeling just prior to his injury. The top of the two upper cogs is guarded with an iron strap conforming to the contour of the cogs and covering one-half of their circumference. The two right-hand cogs at the corner indicated mesh inwards, so that any object touching them at their point of contact and coming from the west would be drawn between them and crushed.

At the east end of the machine the operator stands and feeds the lumber into the machine. It is customary to start the machine by taking hold of the lever just to the right of the large pulley on the right of the machine; and by applying that lever and the idler, which is attached to it, to the main power belt, which extends from the pulley near the roof to one attached to the countershaft on the floor, power is communicated to the belts on the right of the machine, and which operate the knives alone. To the left of the machine is another driving pulley around which is a belt which goes around the driven pulley at the west end of the machine. The belt and pulleys on the left side of the planer operate the cogs and rolls which carry the lumber through the machine. The power is applied to the feed belt by taking the left-hand lever, to which is attached an idler, and pressing it upon the belt in question. The feed rolls are not supposed to be placed in operation unless the left-hand tightener is applied to the feed belt. The distance between the right-hand and the left-hand tightener is about six feet.

Some of the plaintiff's witnesses testified that the feed rolls and cogs on the planer started of themselves by the application of the right-hand or main tightener alone, and without the application of the feed tightener, which was intended for

that purpose. Plaintiff's witnesses also testified that there was a crack in the bed of the machine near the front rolls, that the driven pulley on the left-hand side wobbled, that the feed belt tightener was too short, that the belt operating the feed gear was too tight, and was in the habit of running up on the five-eighths inch flange on the driven feed gear pulley on the left-hand side. There was testimony tending to show that the planing mill in question was an old pattern, and out of repair; that the frame thereof had been broken and mended; that its shafts, pulleys, and gear were badly out of line; that the driven pulley on the feed gear belt wobbled, and the belt frequently ran on its flanges; that the feed gear lever had been broken and shortened; that in rainy weather the feed gear belt ran in the water, and was wet and unreliable and caused shavings and other sticky matter to adhere thereto, and such belt was, by reason of being wet, subject to the elements and contracted and expanded.

There was some evidence to the effect that said machine had been in an improper condition and the feed gear thereof had been customarily starting itself automatically for months before plaintiff was injured; that appellant knew of all of said defects and dangers, and the respondent had no knowledge thereof; and that the appellant failed and neglected to warn or caution the respondent against danger from automatic starting. Two experts testified for the plaintiff that a machine which starts automatically, and is in the condition described by the plaintiff's witnesses, is not in proper repair, and that it was practicable to cover cogs such as the ones which injured the plaintiff's hand. One witness testified that it was customary in the state of Washington to hood such cogs, but the same witness admitted that he did not know the custom as to hooding cogs in Ballard where this mill was situated.

The plaintiff was twenty-five years old at the date of his injury. He had been a millwright for about nine years, and had worked around sawmills since childhood. The greater

part of his experience as a mill hand had consisted in running an edger. Respondent testified that he expressly told the foreman, at the time of his employment, that he was not a planing-mill man; that he was only hired to "fill in with" for a few days; that he had been at work on the machine five days before the injury; that his experience with planing machines of any kind was very limited; and that he was without any as to a machine like the one in question, all of which the appellant knew. He was familiar with the situation of the particular cogs, and knew that they would injure his hand if it came in contact with them. He had worked upon the planer in question a little over five days before his hand was injured. He had started up the machine a number of times himself, and knew the noise that it made with the feed gear in operation, and its sound when at rest. He had frequently seen the knives on the machine changed. The plaintiff claimed, however, that on the occasion of his injury he did not know that the machine was to be started up.

Between ten and eleven o'clock on the morning of March 11, 1903, the day of his injury, the plaintiff had cut all of the lumber he had on his trucks, and shut his machine down. He went to the back end of the machine on the south side. Avey, one of appellant's foremen, then ordered him to clean out the shavings from under the machine. This he proceeded to do at the northwest corner. Paul Kirkendall, a fellow laborer of respondent, worked at the trimmer to the west of the planer. Just before his conversation with Avey, respondent asked Kirkendall if he was going to change the knives on the machine, and Kirkendall replied that he did not know. The attitude of plaintiff immediately before his injury was as follows: He was kneeling upon the floor on one knee, with his head partly under the northwest corner of the machine, with his right hand engaged in pushing shavings up the blower, and with his left hand resting on the bed of the machine, between eight inches and one foot from the point of contact of the two inmeshing cogs.

It appears that, at this time, Paul Kirkendall, the trimmer-man, had been ordered by Avey, the foreman, to leave his position as trimmer and change the knives on the planer. In order to do this, it was necessary to run from the machine the last board of the truck load Williams had been cutting. Kirkendall accordingly went around to the east end of the planer and applied the main tightener. There was a sharp conflict of evidence as to whether Kirkendall had started up the feed rolls by the application of the main tightener alone, or whether he had put them in motion by applying the feed lever. The plaintiff testified that, at the time his hand was caught in the cogs, he looked toward the front end of the machine and saw Kirkendall standing at the main idler at the northeast corner applying it to the power belt. Plaintiff also testified that, while he was in the attitude described, using his right hand, and with his left hand resting on the bed of the planer, his attention was attracted by a noise of some kind; that he was so startled and frightened by the sound that, in attempting to arise from his position on the floor, he put his hand into the cogs, where it was cut off. He also stated that he did not intend to put his hand into the cog, and that his motion in so doing was involuntary, the cog-wheels being not much higher than his waist; that he was under said machine and not expecting it to start, when he heard the machine in motion; that mechanically he made a natural, quick movement to get from under the machine and away from danger, and in doing so, and while his head was under the machine, his hand was moved some eight inches instantly and mechanically, and caught in these open, dangerous, and unguarded cogs, so running automatically; that had the cogs in which plaintiff was injured not started until the lever on the south side (which operated them and tightened the belt that propelled said cogs) been pulled forward and the idler placed upon that belt, plaintiff would have had ample time to have escaped from under said machine safely, and to have walked many feet while said cogs

remained at rest; that the automatic starting of these feed gear cogs put plaintiff in immediate peril; that they could have been protected and guarded with a trifling expense.

The testimony of the defense was directed toward the following issues: Witnesses testified that the automatic starting referred to was not unusual; that the machine in question was in perfect order at the time of the injury to the plaintiff; that it was unusual and impossible to guard expansion gears such as the ones in question; that all modern planers are provided with open cogs; that the condition of the belt, the mended bed, and the short lever, had nothing to do with the automatic starting of the machine, and that the planer would not sart automatically under any circumstances with the pressure of the rolls upon a board. At the close of the plaintiff's case, the defendant moved for a verdict of nonsuit on the ground that the plaintiff had failed to show any negligence which contributed to the plaintiff's injury; that the plaintiff's contributory negligence was the proximate cause of his injury; that his injury was the result of assumed risks, and was also caused by the negligent act of a fellow servant. A motion for nonsuit was made and denied, and an exception allowed. The defendant, at the end of all the testimony, requested the court to charge the jury that it was their duty under all the evidence to render their verdict in favor of the defendant. This the court declined to do, and the defendant duly excepted. The jury returned a verdict in the sum above mentioned. A motion for new trial having been interposed and overruled, judgment was entered upon said verdict. From this judgment defendant appeals.

The appellant assigns but two errors; first, that the court erred in refusing to grant defendant's motion for nonsuit; second, that the court erred in refusing to grant defendant's request for a peremptory instruction. These errors are supported in argument under four heads, as follows: (1) That the plaintiff was guilty of contributory negligence preclusive of recovery; (2) that if there was negligence on the part of

the defendant, it was not the proximate cause of plaintiff's injury; (3) that the proximate cause of the injury to respondent was the negligent act of a fellow servant mingled with his own contributory negligence; (4) that respondent assumed the risk of dangers which caused his injury.

To charge a plaintiff in an action of this character with contributory negligence, it must appear that some act or omission on his part caused or contributed to the cause of his injury, and that such act or omission on his part was not such an act or omission as would have been done or permitted by a person of ordinary prudence under the same circumchances. As to whether a person of ordinary prudence would have done or omitted to do such act, presents a question which is sometimes for the court and sometimes for the jury to decide. If from the evidence and facts in a given case, the court can say that ordinarily intelligent, reasonable, and fair-minded men would not and ought not to believe that said plaintiff was acting as an ordinarily prudent man would have done under the same circumstances, then it is a question for the court, and a motion for a nonsuit, judgment or directed verdict should be sustained. On the other hand, if the evidence, facts, and circumstances are such that the court believes that such men might properly differ as to whether or not the conduct of a plaintiff was such as might have characterized a man of ordinary prudence surrounded by the same conditions and circumstances, then it is a question to be submitted to the jury. Hence, it is for us to decide whether or not the facts and circumstances revealed by the evidence here were such that ordinarily intelligent, reasonable, fair-minded men might differ on the question indicated.

The plaintiff, at the time and immediately prior to the accident, was in a stooping or kneeling posture, with his head and shoulders projected under a large, powerful, and dangerous machine. This machine was suddenly and, to him, unexpectedly, set in motion. He says he was startled by this occurrence, and suddenly and impulsively moved his hand in

such a way as to bring it involuntarily in contact with the revolving cogwheels. He had known of these cogwheels and of the danger appertaining thereto; but at this instant, with his head under the machine and his face turned from said wheels, and a portion of the machine being between his head and said wheels, the existence of such dangerous cogwheels was for the moment forgotten. That he should suddenly move his hand or throw it up in order to assist in getting from under the machine and rising to his feet, would seem to be a very natural movement for a person so situated to make under the circumstances mentioned. At least, we cannot say, as a matter of law, that no ordinarily intelligent, reasonable, fair-minded man would think such a movement consistent with what a man of ordinary prudence might have done under the same circumstances.

In the light of the substantial, competent evidence on behalf of the plaintiff touching the situation and circumstances, and the admitted facts and conditions relative thereto, we think that the question of whether or not the plaintiff was guilty of contributory negligence was a proper one for the jury; and the latter having passed upon the same adversely to appellant, we are bound thereby. That momentary forgetfulness of a known danger does not of itself, as a matter of law, necessarily constitute contributory negligence on the part of the one injured by reason of said danger, has been heretofore held by this court. *Jordan v. Seattle,* 26 Wash. 61, 66 Pac. 114.

As to the question of proximate cause, it cannot be, and is not, by appellant, seriously argued that the maintenance of these exposed cogwheels, where respondent and other workmen must necessarily work in close proximity to them, was not in itself negligence without which this accident would not have occurred. The presence of these exposed cogs certainly contributed to the proximate cause of plaintiff's injury. It must also be remembered that there was evidence on the part of the plaintiff which tended to establish the fact

that, if the machine had been in proper repair, the cogwheels would not have started for some moments after the other part of the machine was in operation, and plaintiff would have had plenty of time to have removed from the dangerous position which he was in. From the evidence adduced in behalf of respondent, it appears that the proximate cause of this injury was made up of three elements: (1) The maintenance by the mill company of the cogwheels in an unnecessarily and improperly exposed condition when it was easy and practicable to cover them at slight expense; (2) the unexpected starting of a portion of the machine by respondent's fellow workman, Kirkendall; (3) the defective condition of the machine and its appurtenances, by reason of which these cogwheels automatically and unexpectedly started when the lever and idler were applied, which should have set in motion the planing knives only.

Two of these elements thus contributing to the proximate cause are chargeable to the negligence of the defendant. The other was the fault of respondent's fellow servant. Where a defendant's negligence is shown to have contributed with that of a third person to produce the proximate cause of an injury to another, such defendant is chargeable as if solely responsible for the proximate cause. *Eskildsen v. Seattle,* 29 Wash. 583, 70 Pac. 64. If a fellow workman of plaintiff, by starting the machine at the time he did, also contributed to the proximate cause, this would not relieve the appellant, as it has been heretofore held by this court that, where the negligence of the master and a fellow servant combine to create a proximate cause, the master is chargeable. *Ralph v. American Bridge Co.,* 30 Wash. 500, 70 Pac. 1098; *Howe v. Northern Pac. R. Co.,* 30 Wash. 569, 70 Pac. 1100.

The determination of the question of assumed risk, presented by the case, is not without difficulties. Ordinarily a servant employed to work about dangerous machinery assumes (in the absence of a statute otherwise providing) the open, apparent, and obvious dangers thereof, and the dangers which

he knows, or ought to know, to be naturally or necessarily incident to his employment; and is called upon to protect himself against such dangers and those of which, by the exercise of ordinary prudence and care, he ought to know, as a workman of ordinary prudence would do under the same circumstances. In this case the dangerous condition of these exposed cogwheels was open, apparent, and known to him; but he testified that he did not know of the defects in the machine which, it was testified, caused these cogwheels to immediately start when the other portion of the machine was set in motion in the manner that it was started at this time by a fellow workman; and he also testified that he had worked about this machine only a few days, and knew nothing of the tendency of these cogwheels to start automatically, or that they had ever done so theretofore. While the servant assumes those dangers which he knows, or ought to know, to be naturally or necessarily incident to the employment in which he is engaged, yet he does not assume the danger of those that are not open, apparent, or obvious, and which he does not know of or have reason to expect as incident to his work.

The question presented to the court is this: Can we say, as a matter of law, that the sudden, unexpected starting of these cogwheels automatically, by reason of some defect or improper arrangement of the machinery, was a danger of which respondent knew, or which he should have anticipated and guarded against as an incident to his work about said machine? We must answer this in the negative. If it were established that he knew this part of the machine to have been in the habit of starting automatically, or that the condition thereof was such that automatic starting was liable to occur; or if the record showed unquestionably that his experience about the machine or his surroundings and opportunities were such that, by the exercise of ordinary prudence and observation, he should have known of the likelihood of such an occurrence, a different question would be presented. But there being competent, material, and substantial evidence that

this part of the machine, by reason of its defective condition, had been in the habit of starting automatically, and was liable to so do, and that the owner knew of these things, and that respondent did not, we cannot overlook such testimony. The evidence tending to show all these matters was sufficient to raise a question for the jury, and the latter having determined the same, and its verdict being upheld by the trial court, we must be bound by its finding thereupon. Some of the testimony on behalf of respondent is very unsatisfactory, and much of it is contravened by strong evidence in support of appellant. But as respondent's contention as to every one of the questions raised on this appeal was supported by a sufficient amount of competent, material evidence to carry the case to the jury, and, if believed by them, to justify a verdict for him, which the trial court sustained, we cannot set the same aside, but are constrained to uphold such verdict.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, HADLEY, and FULLERTON, JJ., concur.

DUNBAR, J., concurs in the result.

[No. 5671. Decided January 5, 1906.]

HANS HANSEN, *Respondent,* v. SEATTLE LUMBER COMPANY, *Appellant.*[1]

MASTER AND SERVANT—UNPROTECTED COGWHEELS—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY. The question of the contributory negligence of the plaintiff is for the jury where it appears that he was engaged as a common laborer to bear away lumber from an edger, that he was requested to take the place of another controlling the live rolls, that he expressed doubt as to his ability to do so, and was injured in attempting to replace a stick, which was about to fall from the rolls, and which lay over an unguarded cogwheel which he did not see and which caught his hand.

[1]Reported in 83 Pac. 102.

SAME — INSTRUCTIONS — SERVANT CHARGEABLE WITH KNOWLEDGE THAT COGWHEELS WOULD CRUSH HAND IF CAUGHT. It is not error to refuse to instruct that every person is charged by law with knowledge of the danger of coming in contact with unguarded cogwheels, where the jury were in the general charge fully instructed as to the plaintiff's duty and contributory negligence in working about such dangerous machinery.

EVIDENCE — PRIOR ACCIDENTS ON SAME AND OTHER COGWHEELS — ADMISSIBILITY. Upon an issue as to whether the defendant knew of the exposed and dangerous condition of cogwheels upon which its servant was injured, evidence is admissible of other accidents happening upon the same cogwheels, and others similarly situated in the same mill, prior to the time of the plaintiff's injury, and that defendant knew thereof.

MASTER AND SERVANT—UNGUARDED COGS—FURNISHING APPLIANCES FOR SAFETY—INSTRUCTIONS—EXPOSED COGS NEGLIGENCE PER SE. It is not prejudicial error to instruct that defendant owed the duty to do all that "could possibly be done" to avoid an injury caused by cogwheels conceded to be unguarded, inasmuch as, under Laws 1903, p. 40, § 1, making it the defendant's positive duty to properly guard exposed cogwheels, it was the duty of the court to instruct that the defendant is guilty of negligence as a matter of law in failing to guard the same.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 13, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for personal injuries sustained by an employee caught in unguarded cogwheels. Affirmed.

G. M. Emory, for appellant.

Martin J. Lund (Walter S. Fulton, of counsel), for respondent.

MOUNT, C. J.—On July 8, 1904, while respondent was working as a common laborer in appellant's sawmill, he caught his left hand in some unprotected cogwheels, and lost the second and third fingers thereof. His hand was otherwise crushed and injured. He brought this action for damages, alleging negligence of appellant in failing to guard and protect the cogwheels. Appellant in its answer denied the alle-

gations of negligence, and pleaded affirmatively contributory negligence and assumption of risk on the part of the respondent. The cause was tried to the court and a jury, which returned a verdict in favor of respondent for $2,500. From a judgment rendered on the verdict, defendant appeals.

Appellant argues, first, that the evidence shows that the respondent was guilty of contributory negligence as a matter of law. Upon this point the evidence shows, that respondent was employed in the mill as second man behind a gang edger to bear away lumber; that he had worked at this employment for about three days. Under the rules and customs of the mill, when the first man behind the edger was away, it became the duty of the second man to move up to the place of the first man; and when the man whose duty it was to operate the live rolls by means of levers was away, it was the duty of the first man behind the edger to take his place. At the time of the injury, respondent had been working for about two hours as first man behind the edger. The man controlling the live rolls left his station for a short time and requested respondent to take his place. Respondent expressed some doubt as to his ability to operate the rolls, but assumed the place.

Soon after he had done this, he saw some timbers coming along the rolls. One of the sticks, four by six inches in size and ten feet in length, was about to fall from the rolls. Respondent thereupon stepped over to the stick and attempted to replace it on the rolls. The stick happened to lie over a pair of revolving cogwheels, which respondent did not see. When he took hold of the stick, his hand was caught in the cogwheels and crushed. There was some evidence to the effect that, when respondent expressed doubt as to his ability to operate the levers which controlled the rolls, they were stopped, and that respondent thereupon started them again. This, however, was disputed by respondent. The evidence shows that it was the duty of the respondent to perform the act he was performing when he was injured. Usually the

question of contributory negligence is a question for the jury, and it is only in rare cases, and where there is no question of fact, or the evidence is undisputed, that the question becomes one of law for the court. *McQuillan v. Seattle,* 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Christianson v. Pacific Bridge Co.,* 27 Wash. 582, 68 Pac. 191; *Jordan v. Seattle,* 26 Wash. 61, 66 Pac. 114. Under the facts as testified to by the respondent, and as above stated, we are clearly of the opinion that this question was one for the jury.

Appellant next complains that the court refused to instruct the jury, in substance, that every person of mature years and ordinary intelligence is charged by law with knowledge of the danger that cogwheels in operation will crush parts of the human body coming in contact with them, and instead thereof instructed the jury as follows:

"You are instructed that mere knowledge on the part of the plaintiff that the cogwheels were uncovered is not, as a matter of law, sufficient to have charged the plaintiff with an assumption of the risk, but such knowledge must have conveyed to the plaintiff the danger that was likely to result to him from the uncovered condition of the cogwheels."

Upon an examination of the instructions, we find that the court fully instructed the jury as to the duty of the plaintiff in working around dangerous machinery. For example, the court charged the jury as follows:

"I charge you that it is the duty of one working around dangerous machinery to use his senses and faculties to a reasonable degree, with a view to avoiding injury to himself, and that failure to use his senses and faculties to any degree at all while working in the vicinity of an open, visible, and exposed cogwheel would, as a matter of law, amount to such negligence on his part as to relieve the defendant from liability, provided such carelessness on the plaintiff's part directly caused or helped to cause his injury. If you believe that the cogwheel was open, unguarded, and plainly visible, at or before the time of plaintiff's injury, and that the plaintiff in the ordinary careful use of his powers of observation saw or ought to have seen it, and yet approached it and

placed his hand on a board so close to the cogwheel that his hand was drawn into it, without looking or watching or thinking of the danger of coming in contact with it, and his failure to look, watch for, or think about the danger was the partial or total cause of his injury, then I charge you that he would be guilty of contributory negligence and could not recover a verdict in this action."

And several other instructions were given to the same effect. The court then gave the following:

"The plaintiff in this case is chargeable with the knowledge that a cogwheel in operation would crush his hand if it came in contact with the cog, provided you find that he was aware, if ordinarily careful, or if ordinarily careful ought to have been aware, of their existence."

These instructions are as favorable to the appellant as could have been given under the rule in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915.

Appellant next contends that the court erred in receiving evidence of two witnesses, who testified that other accidents had happened in the same mill upon these same cogwheels, and others similarly situated, prior to the time of the injury complained of in this case. This evidence was introduced and admitted for the avowed purpose of showing the defective and dangerous condition of the cogwheels, and that appellant knew thereof. We think it was admissible for that purpose; especially, in view of the fact that the complaint alleged that, prior to the time of the accident, the cogwheels were left open, exposed, and unprotected, and that appellant knew of the dangerous condition of said cogs, which allegations were denied by the answer. *Smith v. Seattle,* 33 Wash. 481, 74 Pac. 674; *Stock v. Le Boutiller,* 18 Misc. Rep. 349, 41 N. Y. Supp. 649; *Morse v. Minnesota etc. R. Co.,* 30 Minn. 465, 16 N. W. 358.

Appellant relies upon the cases of *Christensen v. Union Trunk Line,* 6 Wash. 75, 32 Pac. 1018, and *Atherton v.*

Tacoma R. & Power Co., 30 Wash. 395, 71 Pac. 39, where evidence to the effect that motormen had run cars at a high rate of speed on other occasions was held inadmissible, because this issue was a collateral and immaterial issue. In the case before us the condition of the cogwheels did not depend upon the will of the respondent, or the men who had charge of the operation of the machine. The condition was of a fixed and permanent character, made so by the will of the appellant. The fact that these same cogwheels, and others near by in the same condition, had injured other employees was notice of the dangerous condition of the wheels. This appears to distinguish this case from the ones cited by appellant, where the condition was not a fixed condition, but depended entirely upon some act of the operator which may not have been known to the railway company.

Appellant next contends that the court erred in giving the following instruction:

"You are instructed that it is the duty of the defendant to use all reasonable care and forethought to provide appliances necessary to the safety of the plaintiff, and such appliances as would avoid injury to its employes, so far as this could possibly be done, and while it is true that the plaintiff was required to use his faculties for his own preservation, yet he was not required to make a minute examination to discover whether the defendant had discharged his duty towards him as hereinbefore stated."

It is insisted by appellant that the words "so far as this could possibly be done," as used in this instruction, make the appellant an insurer of the life and limbs of its employees. The statute in force at the time of the injury to respondent required the appellant to maintain in use proper safeguards for all cogs, and prohibited the use of such machines not properly guarded. Laws 1903, p. 40, § 1. We have recently passed upon the effect of this statute in *Whelan v. Washington Lumber Co., ante* p. 153, 83 Pac. 98, and *Hoveland v. Hall Bros. Marine R. etc. Co., ante* p. 164, 82 Pac. 1090, where

we held that it was the positive duty of mill companies, or operators of such machines, to properly guard them as required by the statute, and that the term "proper guard" means a sufficient guard. In view of the fact that it was conceded in this case that there was no guard over the cog-wheels on which respondent was injured, it became the duty of the court, under the rule as announced in the two cases last above cited, to instruct the jury that appellant was negligent as a matter of law in using the machine without guards, and permitting respondent to work around the machine with the cogs exposed. It follows, therefore, that the instruction above quoted was not prejudicial to the appellant even if it is erroneous.

Finding no prejudicial error in the record, the judgment is affirmed.

ROOT, CROW, DUNBAR, HADLEY. and FULLERTON, JJ., concur.

[No. 5857. Decided January 5, 1906.]

VAKTAREN PUBLISHING COMPANY, *Appellant,* v. PACIFIC TRIBUNE PUBLISHING COMPANY, *Respondent.*[1]

APPEAL — DISMISSAL — APPEALABLE ORDERS — STRIKING COMPLAINT FOR MISJOINDER OF CAUSES OF ACTION. An order striking a complaint from the files for the reason that it contained two or more causes of action not separately stated is not a final order and is not appealable.

Appeal from an order of the superior court for King county, Albertson, J., entered April 20, 1905, striking the complaint from the files, upon motion of the defendant. Appeal dismissed.

Gaffney & Berg, for appellant.

Bausman & Kelleher, for respondent.

[1]Reported in 83 Pac. 426.

FULLERTON, J.—The appellant and respondent each own and publish a newspaper in the city of Seattle. The appellant brought an action against the respondent, alleging that the respondent had, by deceit and fraud, obtained possession of the appellant's mailing lists, and had used the same for the purpose of enticing away its subscribers. It was further alleged that the respondent had sent its own newspaper to such subscribers, and had published therein false, defamatory, and scurrilous articles concerning the appellant's newspaper, and its management, standing, and integrity, and had thereby induced the appellant's subscribers to quit the appellant's paper and subscribe for the respondent's paper to the loss and damage of the appellant in the sum of $20,000, in which amount it demanded judgment.

In response to the summons served upon it, the respondent made a general appearance in the action, and moved the court to strike the complaint from the files of the court for the reason that it contained two or more causes of action which were not separately stated. This motion was granted by the court, and the appellant, conceiving itself aggrieved thereby, has appealed therefrom.

The respondent moves to dismiss the appeal on the ground that the order appealed from is not an appealable order. This motion must be granted. An order entered before final judgment to be appealable under the statute must in effect determine the action and prevent a final judgment, or it must discontinue the action. This order in effect did neither. It simply determined that the complaint was insufficient in form, not that the appellant had no cause of action. The statute expressly provides that the court may allow an amended pleading to be filed where the original is stricken because it contains more than one cause of action or defense and the same are not pleaded separately. The appellant therefore had the right, when the motion to strike was sustained, to elect whether it would stand on its complaint and allow judgment to be taken against it, or whether it would

amend and make its complaint conform to the court's idea of good pleading. As it did neither, the case was still pending in that court, neither discontinued nor determined, when it attempted to appeal to this court. It should have allowed judgment of dismissal to be taken against it and appealed from that judgment. The condition of the case is analagous to that where a demurrer has been sustained to a complaint, and we have repeatedly held that an appeal will not lie from such an order. *McElwain v. Huston,* 1 Wash. 359, 25 Pac. 465; *Olsen v. Newton,* 3 Wash. 429, 30 Pac. 450; *Mason County v. Dunbar,* 10 Wash. 163, 38 Pac. 1003; *Padley v. Gregg,* 26 Wash. 322, 67 Pac. 72.

The appeal is dismissed.

MOUNT, C. J., ROOT, CROW, DUNBAR, and HADLEY, JJ., concur.

[No. 5586. Decided January 5, 1906.]

H. O. DURK *et al., Appellants,* v. M. C. SCULLY *et al., Respondents.*[1]

APPEAL — DISMISSAL — GARNISHMENT—AMOUNT IN CONTROVERSY—JURISDICTIONAL REQUISITE. A garnishment proceeding upon a judgment for $225, upon which $100 had been paid and credited, is an action at law for the recovery of money involving less than $200, and no appeal lies to the supreme court.

SAME—GARNISHEE—RIGHT OF APPEAL—JUDGMENT—EFFECT—COSTS. A garnishee who claims no interest in a fund of $225 in its hands (less than $200 of which was in controversy between the parties), which was ordered to be paid over to an intervener, without costs to the garnishee, is not entitled to appeal from the judgment on the theory that as to it, the $225 was the amount in controversy.

SAME—COSTS. The failure to award costs to a garnishee against whom no judgment was entered, cannot be made the basis for the right to an appeal by the garnishee.

Appeal from a judgment of the superior court for King county, Griffin, J., entered October 10, 1904, upon findings

[1]Reported in 83 Pac. 426.

in favor of an intervener, after a trial on the merits before the court without a jury, awarding the ownership of funds in possession of a garnishee. Appeal dismissed.

Allen, Allen & Stratton and *Wilshire & Kenaga,* for appellants.

Roberts & Leehey (L. V. Ray, of counsel), for respondents.

PER CURIAM.—In November, 1903, the appellant H. O. Durk recovered a judgment against M. C. Scully for the sum of $250, and costs of action amounting to $17.20. Thereafter he sued out a writ of garnishment, and caused the same to be served on the appellant Fidelity Deposit and Trust Company, requiring it to answer what amount, if any, it was indebted to Scully, and what effects if any it had in its possession or under its control belonging to Scully. The garnishee answered to the effect, that it did not have any money or property which to its knowledge belonged to Scully, but that to secure it against its liability for becoming surety on the bond of Scully, Scully had delivered to it a certified check of one thousand dollars, drawn on the American Savings Bank and Trust Company by the Queen City Cigar Company, which it had afterwards cashed; that, after the service of the writ upon it, but prior to the time of the release of the obligation it had entered into on behalf of Scully, it had been notified that the money was the property of the Queen City Cigar Company, and had been assigned and transferred to the American Savings Bank and Trust Company by the Cigar Company; and that it had thereupon paid over to that company $775 of the money, but held $225 thereof pending the determination of the ownership of the same.

Durk controverted the answer, contending that the money was the money of Scully; that Scully and the Queen City Cigar Company were one and the same person; and that the garnishee was liable to answer to the amount of his judgment notwithstanding the assignment. Pending the trial of this

issue, the American Savings Bank and Trust Company asked and obtained leave to intervene in the proceeding, and thereafter filed its pleading therein claiming to own the money by virtue of the assignment made to it by the Queen City Cigar Company. This pleading was also controverted by Durk. Thereafter the issues were tried out before the court, and resulted in the following judgment:

"This cause having regularly come on to be heard, before the Honorable Arthur E. Griffin, one of the judges of this court, on the 13th day of September, 1904, . . . by agreement of all parties, a jury was waived, and the case submitted for trial to the court. Plaintiff introduced his evidence and rested. Intervener introduced his evidence and rested, and the garnishee, through its counsel, having stated to the court that it took issue with neither party, and the court, after having heard the evidence offered, the arguments of counsel, and being fully advised in the premises, finds upon the issues joined, that the money in question, to wit: The sum of two hundred twenty-five dollars, in the hands of the Fidelity & Deposit Company of Maryland, garnishee, belongs to the intervener, American Savings Bank & Trust Company, a corporation, and that said corporation is entitled to recover the same, and that the garnishee, the Fidelity & Deposit Company of Maryland, has not, and did not have, in its possession, or under its control, when served with garnishment summons, any money belonging to M. C. Scully, and was not indebted to him, and that said garnishee should be discharged as garnishee herein upon its answer and the evidence offered.

"It is therefore ordered, adjudged and decreed that the intervener, American Savings Bank & Trust Company, a corporation, is entitled to receive the money in controversy in the hands of the garnishee, in the sum of two hundred twenty-five dollars, and to recover from plaintiff herein its costs, taxed at $.....; that the garnishee, Fidelity & Deposit Company of Maryland, be, and is, hereby discharged as garnishee without costs of any kind to be taxed against said garnishee."

From this judgment, Durk and the garnishee both appeal.

On the trial it appeared that, prior to the issuance of the writ of garnishment, Scully had paid to Durk $100 to be

credited on the judgment and that there was, at the time the writ was sued out, less the $200 due thereon, and that the amount now in controversy in this proceeding is, and at all times has been, less than $200. Based on this fact the respondent moves to dismiss this appeal on the ground that this court is without jurisdiction. We think the motion must be granted. This is an action at law to recover money, and as the amount in controversy is less than $200, this court is without jurisdiction by virtue of sec. 4 of art. 4 of the state constitution.

The garnishee appellant contends that as to it the amount in controversy is $225, and that a judgment has been entered against it for that amount. But the appellant is mistaken as to the effect of the judgment rendered. It is not a judgment against it, and no execution could be issued against it for the money in its possession. True, costs were not awarded this appellant, but the refusal to award it costs, even though it were found to be entitled to them, does not give it the right of appeal.

The appeal is dismissed

[No. 5852. Decided January 5, 1906.]

THOMAS CHRAST *et al.*, *Appellants*, v. JOHN O'CONNOR *et al.*, *Respondents*.[1]

EVIDENCE—CERTIFIED COPY OF RECORD—ADMISSIBILITY—NECESSITY OF PROVING SIGNATURES TO ORIGINAL—STATUTE. Under Bal. Code, § 6064, a copy of a recorded deed, certified by the recording officer over the seal of his office, is admissible in evidence without proof of the genuineness of the signatures to the original deed.

DEEDS — DIFFERENCE IN NAMES — ABBREVIATION — ADMISSIBILITY IN EVIDENCE WITHOUT EXPLANATION. A deed in the chain of title signed by one Chrast and "Fannie" Chrast, certified in the acknowledgment to be his wife, is admissible in evidence as the deed of his wife "Frances" Chrast, without first showing that they were one and the same.

[1]Reported in 83 Pac. 238.

EJECTMENT — DEFENSES — PLEADING — FORGERY OF DEED — PROOF UNDER GENERAL ISSUE. Where title to real property is alleged generally without deraigning the title, the adverse party may show, under the general issue, that a deed forming the chain of title relied upon was a forgery, and it is error to exclude such evidence on the ground that the forgery was not specially pleaded.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered June 3, 1905, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action of ejectment. Reversed.

H. N. Martin and *J. T. Mulligan*, for appellants.

Merritt & Merritt, for respondents.

FULLERTON, J.—This action was brought by the respondents to recover the possession of, and quiet title to, certain real property situate in Lincoln county. In their complaint the appellants alleged that they were the owners of the premises in question by virtue of a patent to the land from the government of the United States to one John Smith, and by deed from John Smih, who was an unmarried man, to themselves. They further alleged that the respondents wrongfully entered into the possession of the land and dispossessed the appellants, and wrongfully and without right claim some interest in and title to the property. The respondents O'Connor answered disclaiming any title or interest in the property further than that they had a mortgage on the same from the respondents Crist to secure the payment of an indebtedness owing to them by the Crists. The respondents Crist for answer denied generally the allegations of the complaint, and by way of a further and separate answer, set up the following:

"(1) That they are the owners in fee simple and in possession of the following described real estate situated in the county of Lincoln, in the state of Washington, to wit: The south half of the southwest quarter and the south half of the southeast quarter of section four (4) township twenty-one (21) north, range thirty-five (35) E. W. M. (2) That plaintiffs claim to have some right or interest in and to said

real estate, which claim is without right, unfounded and a cloud upon defendant's title. Wherefore defendants pray that plaintiffs take nothing by this action and that the title to said real estate be forever quieted in defendants as against any claim or claims of plaintiffs or either of them, or any person or persons claiming by, through or under plaintiffs, or either of them, and that they have judgment for their costs and for all other proper relief."

The reply was a denial of the new matter in the answer, and an affirmative plea to the effect that the respondents had placed instruments of record purporting to affect the appellants' title to the property which were clouds thereon, and prayed that, in addition to the relief demanded in the complaint, that these clouds be removed from their title.

On the trial, after the appellants had introduced their evidence and rested, the respondents offered a certified copy of the record of a deed from Thomas Chrast and Fannie Chrast to the respondent John O'Connor, purporting to have been duly executed and acknowledged. To this deed the appellants objected, which objection was overruled, and the copy admitted in evidence. After the respondents had rested, the appellants offered evidence tending to show that no deed of this property was ever given by the appellant Frances Chrast to the respondent John O'Connor, and that the deed, the purported copy of which was introduced in evidence bearing the name of Fannie Chrast, was never executed or acknowledged by her, or delivered by her to John O'Connor or any one, and that if her name appeared thereon it had been placed there without her knowledge and consent by forgery and fraud. This evidence was excluded by the court on the ground that the fraudulent execution of the deed had not been pleaded in the reply. The appellants thereupon asked leave to amend their reply in the particular named, so as to make it correspond with the court's idea of a requisite pleading, but this request was also denied. The appellants then rested, whereupon the court, on the motion of the respondents' counsel, instructed the jury to return a verdict for the respondents.

On the return of the verdict, judgment was entered thereon for the respondents according to the prayer of their affirmative answer, and this appeal is taken therefrom.

It is first assigned that the court erred in overruling the objections made to the introduction in evidence of the certified copy of the deed from Thomas Chrast and Fannie Chrast to John O'Connor. The deed was objected to on the ground that it was not shown that the signatures to the original deed were genuine, and that it did not on its face purport to be the deed of the appellant Frances Chrast. To the first part of the objection it is a sufficient answer to say that the deed was admissible under the statute which provides that a copy of a deed recorded pursuant to law, when certified by the officer having the lawful control of the record, over the seal of his office, shall be received in evidence to all intents and purposes as the original itself. Bal. Code, § 6046. This statute was intended to make available as evidence the record of instruments recorded pursuant to the recording acts; and under it a certified copy of the record of an instrument which was entitled to be recorded is of itself *prima facie* evidence that the instrument is what on its face it purports to be. It is presumed to be genuine, and to have been made for the purposes for which it purports on its face to have been made, and one asserting the contrary must prove it. To hold that such copy cannot be introduced in evidence without first proving the genuineness of the original is to render the statute nugatory.

The second part of the objection has its foundation in the fact that Frances Chrast was the wife of Thomas Chrast at the time the land was acquired by him, and has been such at all times since, while the deed in question was executed by Thomas Chrast and Fannie Chrast. But while the names Frances and Fannie are not of the same sound, the latter is a very common form of the former, if not an accepted abbreviation of it. Moreover, the deed was in the chain of title, and bore the notary's certificate to the effect that Fannie

Chrast was the wife of Thomas Chrast. Under these circumstances, we think it was not error to admit the certified copy of deed without first showing that Frances Chrast and Fannie Chrast were one and the same person.

It is next contended that the court erred in refusing to allow the appellants to show that the deed purporting to have been executed by the appellant Frances Chrast was a forgery. This contention must be sustained. Had the respondents in their further and separate answer deraigned their title so that it would have appeared that this deed formed a part of the chain of title on which they intended to rely in proving their case, the appellants could not have attacked it without first setting forth the grounds of their attack in their reply. But title is alleged generally without deraigning it; and where such is the case, the party contesting the claim of title may plead the general issue, and thereunder introduce any evidence which tends to defeat the evidence of title shown by the party asserting title. This question was before this court in *Parker v. Dacres,* 1 Wash. 190, 24 Pac. 192. In that case the plaintiff alleged title in fee in himself without deraigning his title. The defendant answered by a general denial, and by a plea of title in himself. The court below, over plaintiff's objection, allowed the defendant to dispute the plaintiff's evidences of title, notwithstanding he had not attacked them in his pleadings. The plaintiff assigned the ruling as error on appeal, and ruling thereon, we said:

"Had the plaintiff in this action set out fully his chain of title, so that it would have appeared that he claimed under said Sheil, it might have been necessary for defendant, in order that he might show acts of said Sheil, to have set out the same in his answer. But when, as in this case, a defendant is not at all advised as to the source of the plaintiff's title, he can content himself with a general denial, and thereunder introduce any legal evidence that tends to defeat the title of the plaintiff, as shown by his proofs. Any other rule would work great hardship to a defendant, while the enforcement of said rule cannot work hardship to a plaintiff, as he

can, if he so desires, so shape his complaint as to compel defendant to fully disclose his defense in his answer."

The same question was before the supreme court of Wisconsin in *Mather v. Hutchinson,* 25 Wis. 27, where it was said:

"The evidence upon this subject was objected to, upon the ground that these facts were not alleged in the answer. But the action was for the recovery of real estate. The complaint was in the ordinary form, and did not disclose the origin of the plaintiff's title. And we have held that in such an action, under such a complaint, the defendant, under the general denial, must be allowed to prove anything which would defeat the title offered by the plaintiff. Any other rule would place him at a great disadvantage. The plaintiff, not being bound to disclose the title relied on in his complaint, may, at the trial, offer any evidence of title which he pleases. With such a rule as to the plaintiff, it would be manifestly unjust to exclude the defendant from proving that the title offered by the plaintiff was void for fraud or any other reason, because he had not specifically set forth the facts in his answer. It would require him to foreknow and avoid, by specific allegations, a title which the plaintiff was not bound to disclose at all."

See, also, *Carkeek v. Boston Nat. Bank,* 16 Wash. 399, 47 Pac. 884.

The last assignment, namely, that the court erred in refusing to allow the reply to be amended, is not material since we hold that the pleadings were sufficient to admit the rejected evidence without amendment, and we shall not discuss it.

The judgment is reversed, and cause remanded for a new trial.

MOUNT, C. J., DUNBAR, ROOT, HADLEY, and CROW, JJ., concur.

[No. 5871. Decided January 5, 1906.]

In the Matter of the Condemnation of EAST SPRING STREET, *Seattle.*

THE CITY OF SEATTLE *et al., Respondents,* v. W. E. WILLIAMS *et al., Appellants.*[1]

APPEAL — RECORD — CONDEMNATION — INSPECTION OF PREMISES — KNOWLEDGE GAINED NOT BROUGHT UP—VERDICT—REVIEW. A view by the jury in a condemnation case does not preclude the appellate court from a review of the questions of fact.

EMINENT DOMAIN—EVIDENCE OF VALUES—SUFFICIENCY TO SUSTAIN VERDICT—VIEW BY JURY—NEW TRIAL—DISCRETION OF LOWER COURT. The verdict by a jury assessing damages for land appropriated by a city for a street at $300 per acre should not be set aside as contrary to the evidence from the fact that the lowest estimate of the value by any witness on either side was $400 per acre, where there was other evidence bearing upon the value, the jury viewed the property, and the trial court refused to set aside the verdict on that ground (RUDKIN and HADLEY, JJ., dissenting).

Appeal by defendant from a judgment of the superior court for King county, Morris, J., entered July 6, 1905, upon the verdict of a jury assessing the damages in a condemnation proceeding, after a trial on the merits. Affirmed.

Fred H. Peterson and *H. C. Force,* for appellants, contended, *inter alia,* that the assessment of damages should have been set aside as contrary to the evidence; the view of the jury does not authorize them to disregard the evidence. *Chicago etc. R. Co. v. Parsons,* 51 Kan. 408, 32 Pac. 1083; *Jeffersonville etc. R. Co. v. Bowen,* 40 Ind. 545; *Seattle etc. R. Co. v. Roeder,* 30 Wash. 244, 70 Pac. 498; *Wright v. Carpenter,* 49 Cal. 607; *Washburn v. Milwaukee etc. R. Co.,* 59 Wis. 364, 18 N. W. 328; *Grand Rapids etc. R. Co. v. Weiden,* 70 Mich. 390, 38 N. W. 294; *Atchison etc. R. Co. v. Schneider,* 127 Ill. 144, 20 N. E. 41, 2 L. R. A. 422; *Peoria Gas Light etc. Co. v. Peoria Terminal R. Co.,* 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373; *Bigelow v. Draper,* 6 N. D.

[1]Reported in 83 Pac. 242.

152, 69 N. W. 570; *Palmer v. Harris County,* 29 Tex. Civ. App. 340, 69 S. W. 229; 15 Cyc. 880; Thompson, Trials (2d ed.), § 896; *Close v. Samm,* 27 Iowa 503; *City of Topeka v. Martineau,* 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775; *City of Grand Rapids v. Perkins,* 78 Mich. 93, 43 N. W. 1037.

Scott Calhoun and *O. B. Thorgrimson,* for respondents.

Root, J.—The respondent city instituted condemnation proceedings to acquire a strip of land belonging to appellant Williams, which parcel of land was a portion of an unplatted tract, and which would be situated between the lines produced of one of the public streets of said city; and was desired for public street purposes, so that said street could be connected with a street upon the opposite side of said property, thus making a continuous street of full width, a narrow lane or alley already connecting the two portions of the street extending in either direction from said parcel of land. A jury was empanelled and sworn to fix the value of the property to be thus taken by the city. Numerous witnesses gave evidence as to the value of the parcel sought to be appropriated. These witnesses testified as to the location, character, surroundings, accessibility, desirability, and disadvantages of said strip of real estate, and each gave his estimate as to its reasonable value. The lowest estimate of value placed upon the property by any witness was $400, and several of them fixed the amount in many times this sum. The jury, by consent of the parties, viewed the premises and, having heard all of the evidence, returned a verdict wherein they fixed the value of said property at $300. The appellants moved for a new trial upon the ground that the jury erred in assessing the amount of the recovery in that it was too small, and that the verdict was not supported by the evidence, but that it was contrary thereto in that the amount of the recovery was grossly inadequate. This motion was overruled by the trial court, and

judgment entered upon the verdict. An appeal is taken therefrom.

It was urged by appellant that the amount of the verdict, $300, being less than the lowest estimate of value fixed by any witness, said verdict is unsupported and contrary to the evidence, and that for that reason the trial court should have granted a new trial. We do not think this necessarily follows. In a case of this kind the granting of a motion for a new trial is peculiarly within the discretion of the trial court. It was suggested by respondent that, inasmuch as the members of the jury themselves viewed the premises and doubtless used the information they thereby gathered, we cannot review their verdict for the reason that what they themselves learned by an inspection of the premises constituted evidence which we cannot have before us, and that we must therefore apply the rule which prevents an appellate court from reviewing questions of fact where all of the evidence is not brought up. We do not think the rule invoked should be applied to a matter of this kind. The jury is not permitted to view the premises for the purpose of gathering evidence, but for the purpose of better understanding the evidence which has been adduced before it regarding said premises. We will therefore review questions such as are presented here notwithsanding it appears that the premises were inspected by the jury.

Answering appellants' contention that there was no evidence to sustain a verdict for less than $400, we call attention to the fact that the placing of an amount upon this property by each of the witnesses as its value was merely the expressing of the opinion of such witness. If there were no evidence in the case except these expressions of opinions by the various witnesses, and no evidence or facts which could be deemed at variance therewith, we would doubtless feel that a case was presented wherein the trial court should have granted a new trial. But there was other evidence. One of the witnesses, although he had fixed the value of the parcel of land

at a certain sum, nevertheless in speaking thereof, said it had "virtually none, in the ordinary way and sense of selling property." Each and all of these witnesses gave a description of this property, and stated numerous facts calculated to show its advantages and disadvantages, considerable evidence being given as to the selling price of other real estate in that part of the city.

All of this evidence had to do with facts which the jury had a perfect right, and which it was their duty, to consider in arriving at their verdict. The facts thus established by this evidence evidently led the jury to reach an opinion in their own minds which was different from that of any of the witnesses. The evidence of these various witnesses as to the condition, qualification, environment, merits and demerits of this property, and as to the prices for which other property had sold in that neighborhood, viewed in the light of their own observations when they viewed the premises, induced the jury to fix the value of said premises in an amount lower than that estimated by any witness except the one who said it had "virtually none." As a matter of law, it was certainly the privilege of the jury to do this. Having done so, and the appellants having moved for a new trial, it then became the duty of the trial judge to ascertain whether or not there were any reasons for setting aside such verdict. If he believed the verdict to be grossly inadequate, or that a fair legal trial was not had, he should have granted a new trial. No passion or prejudice, or facts from which it would necessarily be inferred, are charged; and this is not made a ground of the motion for a new trial. We cannot therefore presume that the jury was thus affected.

To the contention that, in the light of all of the evidence, the verdict was so grossly inadequate as to make it an abuse of discretion for a trial judge to permit it to stand, we must say that it does not so appear. The case was tried by a resident judge of Seattle who may be reasonably presumed

to have known, at least in a general way, of the situation, character and value of this property and perhaps not unacquainted with the witnesses. The latter were personally before him. He heard their testimony and saw their appearance and conduct upon the stand. He could observe their manner of answering questions and giving testimony. All of these matters furnished the trial judge a much better opportunity to weigh the testimony than has a judge in an appellate court. In view of these facts, and especially in view of the fact that the amounts stated by the various witnesses were but the expression of opinion, and keeping in mind that there was much other evidence touching the character and condition of the property, we cannot say that the trial judge was guilty of an abuse of discretion in not granting the motion for a new trial. That courts should be slow to overturn verdicts rendered in proceedings of this kind, may be seen by an examination of the following authorities: 7 Ency. Plead. & Prac., 581, 593, 594; *Parks v. Boston,* 15 Pick. 198; *Chicago etc. R. Co. v. Jacobs,* 110 Ill. 414; *McReynolds v. Burlington etc. R. Co.,* 106 Ill. 152; *City of Kansas v. Street,* 36 Mo. App. 666; *City of Kansas v. Butterfield,* 89 Mo. 646, 1 S. W. 831; *Guyer v. Davenport etc. R. Co.,* 196 Ill. 370, 63 N. E. 732; *Conness v. Indiana etc. R. Co.,* 193 Ill. 464, 62 N. E. 221; *Kiernan v. Chicago etc. R. Co.,* 123 Ill. 188, 14 N. E. 18; *Omaha etc. R. Co. v. Walker,* 17 Neb. 432, 23 N. W. 348; *Groves etc. R. Co. v. Herman,* 206 Ill. 34, 69 N. E. 36; *Mitchell v. Illinois etc. R. Co.,* 85 Ill. 566; *Shoemaker v. United States,* 147 U. S. 282, 13 Sup. Ct. 361, 37 L. Ed. 170; *Washburn v. Milwaukee etc. R. Co.,* 59 Wis. 364, 18 N. W. 328; *Beveridge v. Lewis,* 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 92 Am. St. 188, 59 L. R. A. 581; *Fort-St. Union Depot Co. v. Jones,* 83 Mich. 415, 47 N. W. 349; *Lehigh Valley Coal Co. v. Chicago,* 26 Fed. 415; *In re Smith,* 15 N. Y. Supp. 516; *Stockton v. Chicago,* 136 Ill. 434, 26 N. E. 1095; *Gorgas v. Philadelphia etc. R. Co.,* 144 Pa. St. 1, 22 Atl. 715.

In the case of *Conness v. Indiana etc. R. Co., supra,* the court said:

"In this class of cases, where the jury is allowed to go and view the premises and act from their own knowledge as well as from the evidence, we should only feel warranted in setting it aside where it appeared grossly inadequate or grossly excessive."

In the case of *Beveridge v. Lewis, supra,* the court held, in substance, that,

"The jury may be permitted, in weighing the evidence in an eminent domain proceeding, to exercise their individual judgment as to values upon subjects within their knowledge which they have acquired through experience and observation."

In the case of *Groves etc. R. Co. v. Herman, supra,* the court said, in effect, that,

"In proceedings for the condemnation of land, the jury may base their verdict on knowledge gained from inspection of the premises, as well as upon the testimony of witnesses whose statements were mere opinions and conclusions as to the extent of damages."

The supreme court of Pennsylvania, in *Hartman v. Reading etc. R. Co.* (Pa.) 13 Atl. 774, used this language:

"When a jury have viewed and examined the premises [in proceedings to recover damages sustained by the construction of a railroad], their own observation . . . is just as good as that of any of the witnesses; and while they are not to disregard the testimony produced on the trial, they are, nevertheless, not required to repudiate the evidence of their own senses."

And in the case of *City of Kansas v. Butterfield, supra,* the court sustained an instruction to the following effect:

"That the jury are not bound by the testimony of experts and others concerning the value of the land proposed to be taken and the actual damage done, but may apply their own judgment and knowledge as to such value and damage, in connection with the testimony in the case."

It will be noticed that these courts have gone much further than we find it necessary or proper to go in this case.

No error being assigned except that upon the action of the trial court in overruling the motion for a new trial, and it not being made to appear that such ruling was erroneous, the judgment of the superior court is affirmed.

MOUNT, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

RUDKIN, J. (dissenting)—The sole question at issue in this case was the value of a tract of land sought to be appropriated for a public use. The verdict of the jury is substantially less than the lowest estimate placed on the property by any witness on either side. Such a verdict is, in my opinion, contrary to the evidence and should be set aside. I therefore dissent.

HADLEY, J., concurs with RUDKIN, J.

[No. 5717. Decided January 5, 1906.]

DOWNS FARMERS WAREHOUSE ASSOCIATION, *Respondent*, v. PIONEER MUTUAL INSURANCE ASSOCIATION, *Appellant*.[1]

APPEAL—STATEMENT OF FACTS—PLACE OF CERTIFICATION. Where no amendments are proposed to a statement of facts in a case tried before a visiting judge, the same may be certified outside of the county or judicial district in which the case was tried.

INSURANCE — LOSS BY FIRE — POLICY — CLAUSE FOR SUBROGATION AGAINST PARTY CAUSING FIRE—RELEASE BY INSURED AS BREACH OF SUBROGATION CLAUSE. Where a clause in a fire insurance policy provides that the insurer shall be subrogated to the rights of the insured against any person whose act or neglect caused the fire, and after the issuance of the policy the insured entered into a contract with a railroad company releasing it from all liability for fires caused by it, there can be no recovery upon the policy for a loss by a fire caused by sparks from a passing engine of said railroad company.

[1]Reported in 83 Pac. 423.

Appeal from a judgment of the superior court for Lincoln county, Chapman, J., entered December 17, 1904, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on a policy of fire insurance. Reversed.

H. T. Granger, for appellant.

Martin & Grant, for respondent.

Crow, J.—This action was commenced by the Downs Farmers Warehouse Association, a corporation, respondent, against the Pioneer Mutual Insurance Association, a corporation, appellant, to recover the sum of $2,000, upon a fire insurance policy issued by appellant upon a certain warehouse and contents on the line of the Great Northern railway, at Downs, in Lincoln county, which was totally destroyed by fire on June 6, 1904. The complaint was in the usual form for an action upon a fire insurance policy. Appellant, as an affirmative defense, alleged that said policy contained the following condition:

"If this association shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this association shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the member for the loss resulting therefrom, and such right shall be assigned to this association by the member on receiving such payment;"

that, subsequent to the issuance of said policy, and prior to the date of said fire, respondent entered into a certain written contract with the Great Northern Railway Company, for a license to enter upon, and occupy, the premises upon which said warehouse was located, which said contract in part provided as follows:

"In consideration of the premises said party of the second part does hereby consent and agree to and with the said party of the first part that it will forever protect, save harmless and indemnify said first party from all damages or liability what-

soever which shall or may be during the existence of this agreement, caused by or result from the frightening of horses or other animals of said second party or belonging to any other person while upon said premises, by locomotives or cars, fire, coal or sparks escaping or being scattered from the engines or trains of said first party while being operated on its main spur or side tracks, in hauling empty or loaded cars to and from said premises above described, or from engines on tracks passing said premises on said main or side tracks, and for said consideration said party of the second part does further consent and agree to defend and save harmless said first party from all suits, costs, damages and expenses, which may or shall be brought on account of or result from fire caused by sparks or coal escaping or being scattered from the engines and trains of the first party while operating its main or side tracks to, by or from said premises;"

that the party of the first part in said contract mentioned was the Great Northern Railway Company, and the party of the second part was respondent; that the fire which caused the destruction of said warehouse was caused by the act of the Great Northern Railway Company by reason of sparks from an engine operated by it falling upon and igniting said building; that in its proof of loss respondent stated, under oath, that said fire was so caused, and that, by reason of the contract between respondent and said railway company, respondent has been prevented from assigning to appellant any right of action, which it might otherwise have against said railway company for damages arising out of said fire, and appellant has been deprived of its right to be subrogated to such right of action. Trial was had before the court and a jury, and upon a verdict in favor of respondent, final judgment was entered, from which this appeal has been taken.

Respondent has moved to strike the statement of facts, for the reason that the judge who certified the same was not in Lincoln county, the place of trial, nor in the judicial district of which said county is a part, at the time of making his certificate. In support of this motion respondent cites *Prospectors' Development Co. v. Brook*, 31 Wash. 187, 71 Pac.

774, in which it appears that the respondent had proposed amendments to the appellant's proposed statement of facts after it had been filed and served. Here no amendments were proposed, which fact differentiates this case. This cause was tried before Honorable W. O. Chapman, judge of the superior court of Pierce county, as visiting judge in Lincoln county. No amendments having been proposed to appellant's proposed statement of facts, it became the duty of the trial judge to certify said statement, without notice. Bal. Code, § 5058. This being true, it was not necessary for the respondent to be present when such certificate was made, no hearing being contemplated; hence, said statement of facts was properly certified by said visiting judge while in his own county. Laws 1901, chap. 57, § 2, p. 77. The motion is denied.

After the evidence of appellant and respondent had been introduced, appellant challenged its sufficiency and moved the court to direct a verdict in its favor. This motion was denied, and appellant's only assignments of error are, that the court erred in denying said challenge and motion, and in refusing a new trial. These assignments of error raise but one question, Was the evidence sufficient to sustain the verdict rendered or to justify the court in submitting any issue of fact to the jury? After a careful examination of the entire record, we conclude the court erred in refusing to sustain such challenge. There is no dispute but that the policy contained the clause above mentioned. The undisputed evidence fully sustains the allegation of the answer to the effect that respondent entered into the written contract with the Railway Company as pleaded by appellant.

In its first letter to appellant, giving notice of the fire, respondent said: "Our warehouse burned last Monday evening between seven and eight o'clock. Caught from east-bound passenger train. It threw sparks upon the roof." Thereupon appellant immediately sent its representative to Downs to adjust the loss, and wrote respondent, asking its co-operation in a joint action against the Railway Company for damages,

and also in securing evidence to support such action. Considerable correspondence took place between the parties, when finally the president of the Warehouse Association, in a letter to appellant, inclosed what purported to be a written copy of its contract with the Railway Company. This copy, made by said president himself, contained the identical clause pleaded in appellant's answer. On the trial there was some contention upon the part of respondent to the effect that it had not entered into any contract with the Great Northern Railway Company, but the undisputed evidence sustained appellant's allegation that such contract was made.

As the evidence, therefore, shows the issuance of the policy with the clause above mentioned, and that respondent afterwards entered into said contract with the Great Northern Railway Company, it was impossible for respondent to assign to appellant any valid claim against the said Great Northern Railway Company for damages sustained by reason of said fire. The policy provided that, if the Insurance Association should claim the fire to have been caused by the act of any other person or corporation, then on payment of loss, the assured should assign to said Insurance Association any claim against such other person or corporation. This is a valuable clause in the policy, and one which has been enforced by the courts. The effect of the assured releasing the Railway Company from liability was to put itself in a position where it could not comply with this subrogation clause, and for that reason the making of the contract with the Railway Company invalidated the insurance policy in the event of loss by fire caused by any act of the Railway Company. This destroyed a valuable right given to the Insurance Association by and through which it could otherwise sue the Railway Company and recoup itself for the loss which it might pay to the assured.

"An insurance company which has indemnified the owner of property for loss incurred by him is entitled to all the means of indemnity which the latter had against the party

primarily liable, to the extent of the payment, and it may therefore bring and control, in the name of the insured, a suit against the wrongdoer who has occasioned the loss." 4 Current Law, 220.

"When the insured covenants that on receiving payment he will assign to the company any claims he may have against any one whose negligence or fault may have caused the loss, refusal of the insured to make the assignment before or concurrent with the payment is a good defense to a suit." 2 May, Insurance (4th ed.), § 454, p. 1056.

"The law is well established that an insurance company which has been compelled to pay, or has paid, a loss covered by its policy, has, after such payment, a right of action against the person who wrongfully caused the fire and loss to the amount such insurance company paid even without any formal assignment by the assured of his claim against the party primarily liable. And the courts have likewise been very firm in supporting the right of the insurance company to bring an action in the name of the assured, and will not allow the latter to defeat such action even by a release or discharge of the person by whose act the damage was occasioned." 2 Wood, Fire Insurance (2d ed.), p. 1085, § 500.

In *Kennedy Bros. v. Iowa State Ins. Co.,* 119 Iowa 29, 91 N. W. 831, the supreme court of Iowa said:

"Whether an insurance company, having paid a loss under a policy issued by it, is entitled by subrogation to recover the amount paid by it from the railway company, through whose negligence the fire occurred, although no provision is made for it in the policy, we are not called upon to determine. It was competent for the parties to incorporate such a provision in the contract of insurance, and that was done in this instance. Now, of course, there can be no such thing as subrogation where the party insured has contracted away all right of recovery as against the railroad company, and it follows in reason and from authority that, where it appears the insured has contracted away the right of the insurance company to subrogation without its knowledge and consent, he cannot recover, in case of loss upon the policy."

See, also, *Sims v. Mutual Fire Ins. Co.,* 101 Wis. 586, 77 N. W. 908; *Bloomingdale v. Columbia Ins. Co.,* 84 N. Y. Supp. 572.

Some contention is made by the respondent, to the effect that it did not know of this clause in the policy, as its attention was not called to the same until after the fire. Respondent, however, sued upon the policy and, in its pleadings, failed to allege such want of knowledge or any fraudulent act on the part of appellant. A contract of insurance, with or without such a clause, is a contract of indemnity. Under the law, an insurance company, upon payment of the loss, would be equitably entitled to be subrogated to all rights of an assured against any other person causing the fire, to the extent of such payment by the insurer. Any voluntary act upon the part of the assured destroying such right of subrogation should relieve the insurer from liability. We are unable to find any conflict in the evidence sufficient to authorize the submission of any issue of fact to the jury. The jury returned a verdict in favor of respondent; such verdict is not supported by the evidence, and cannot be permitted to stand. The undisputed evidence, much of it in written form, taken in connection with conceded facts, constitutes a complete bar to any right of recovery on the part of respondent. There was no question for the jury. It was simply the duty of the court to apply the law to undisputed facts. The challenge to the sufficiency of the evidence should have been sustained, and a verdict in favor of appellant should have been directed.

The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of appellant.

Mount, C. J., Root, Hadley, Fullerton, and Dunbar, JJ., concur.

[No. 5894. Decided January 5, 1906.]

AUGUSTA JOHANSEN, *Appellant, v.* M. MULLIGAN, *Respondent.*[1]

FISH—FISH TRAPS—LOCATION—CONFLICT—LATERAL PASSAGEWAY—STATUTORY REGULATION—MEASUREMENTS. Laws 1905, p. 254, § 1, providing that there shall be a lateral passageway of at least 900 feet between fish traps in the Columbia river, requires that every trap shall be so located, that there shall be no other trap within a distance of 900 feet laterally on either side; and in determining this passage way measurements must be made at right angles to the subsequent location as well as to the prior traps.

SAME — SUBSEQUENT LOCATION — INJUNCTION AGAINST OPERATION. Where a fish trap encroaches upon the passageway of prior locations, and it is admitted that it catches fish that would otherwise be caught by the prior traps, the prior locators are entitled to enjoin the maintenance of such trap.

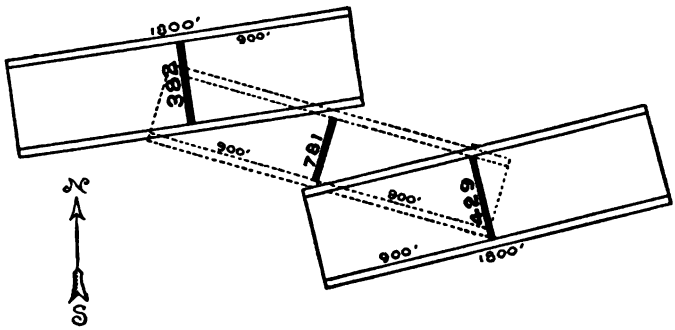
Appeal from a judgment of the superior court for Pacific county, Rice, J., entered September 27, 1905, upon overruling a demurrer to defendant's answer, dismissing an action to enjoin the operation of a fish trap. Reversed.

McBride, Stratton & Dalton, for appellant.

B. F. Heuston and *T. W. Hammond,* for respondent.

HADLEY, J.—This action involves a dispute concerning the lateral passageway between fish trap locations. The traps are located in the waters of Baker's bay, near the mouth of the Columbia river. The plaintiff contends that the defendant's trap encroaches upon her own location, and also upon that of another. She has brought this action to enjoin defendant from maintaining his trap at its present location. The relative location of the traps mentioned in the complaint may be illustrated by the following diagram:

[1]Reported in 83 Pac. 417.



The heavy dark line numbered 429 represents the plaintiff's trap; that one numbered 781 represents the defendant's location; and the one numbered 382 represents the location of one Soderland. Traps 429 and 382 were located prior to 781, the defendant's trap. The following appears in defendant's answer:

"Defendant, however, admits that if base lines were drawn at right angles with the general course of defendant's said trap No. 781, and intersecting the ends thereof, such base lines produced on the side towards plaintiff's trap No. 429 would cut said trap No. 429 at a distance of from 750 to 875 feet; in other words, this defendant has allowed an area in the form of a rectangle having a total length of 1,800 feet, being 900 feet on each side of the trap and the length of the trap plus thirty feet on each end in width, as incident to each of said traps 429 and 382, which were the traps first originally established, within which area defendant has not located or attempted to locate a new trap; but if the court should hold it to be the law that there must be allowed as incident to the trap last established another and further lateral passageway in the form of a rectangle 1,800 feet in length, being 900 feet on each side of the trap and the length of the new trap in width as incident to the new trap, within which area no part of any trap previously established might lawfully be, then defendant has not allowed such a lateral area for his trap No. 781 on the side thereof towards plaintiff's trap No. 429."

From the foregoing it will be seen that the only question raised is whether there is a lawful lateral passageway between defendant's trap 781 and plaintiff's trap 429. The trial court overruled a demurrer to defendant's answer, and the plaintiff having elected to stand upon her demurrer, and having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

It is provided in § 1, chap. 140, Laws 1905, p. 254, as follows:

"There shall be an end passageway of at least thirty feet, and a lateral passageway of at least nine hundred feet, between all pound nets, traps, weirs, fish wheels, or other fixed appliances hereafter constructed and placed within the waters of the Columbia river and its tributaries."

Such had also been the law since 1893. The contention in this case is as to the application that shall be made of that statute to the locations above described. It is the contention of respondent that the only lateral passageway to be considered is that incident to appellant's trap, designated in the space contained within the parallelogram formed by the two base lines drawn at right angles to the general direction of her trap 429 produced nine hundred feet on either side of the trap, and by the two lines connecting the same drawn parallel to the course of the trap nine hundred feet on either side thereof, as indicated in the diagram. The same contention is made as to location 382, with reference to which a similar parallelogram is drawn in the diagram. It is urged that neither 429 nor 382 can complain of the location of any subsequent trap which falls entirely without those parallelograms, as it will be seen is true of respondent's trap 781. It will be further observed, however, that a similar parallelogram drawn with reference to 781 includes portions of traps 429 and 382. Respondent argues that, although the parallelogram that would under ordinary circumstances be allowed to him by law cuts the other locations, yet that it is his misfortune due to his being the subsequent locator, and that the

other locators cannot complain since he is not in their territory. When the legislature said: "There shall be . . . a lateral passageway of at least nine hundred feet between all . . . traps . . .," what did it mean? Did it mean that such passageway and measurement shall be considered only with reference to two traps whose general directions are parallel and whose lateral directions are therefore both facing or in front of each other? Did it mean that when a trap is so located that it nowhere crosses the plane which extends laterally from another and prior trap and within nine hundred feet of it, there is no lateral passageway between the two? Respondent's position is that it was simply intended to accord to each trap, as incident to it, an unobstructed parallelogram eighteen hundred feet in length, extending nine hundred feet laterally on either side of it, and that no further or other rights appertaining to lateral passageways are to be considered.

This, he says, is true of the prior locator. But he contends that the subsequent locator may locate anywhere without the parallelogram of the former trap, and without reference to his lateral distance from such former trap. This, we think, is clearly unsupported by the statute. The lateral distance of nine hundred feet is an incident to the subsequently located trap, and must be observed. There is as certainly a lateral direction incident to the new trap as there is to the older one, and we think the statute requires, as plainly as simple Anglo Saxon words can express it, that every trap shall be so located that there shall be no other trap within a distance of nine hundred feet laterally therefrom. There is a space *between* appellant's and respondent's traps. That space constitutes a passageway between the two traps. It is lateral to respondent's trap, and is therefore its lateral passageway. All traps must have a lateral passageway of at least nine hundred feet, whereas respondent's has less.

It is contended that, to determine the location of the lateral

passageway between two traps, measurements must be made at right angles from the prior trap only. There is nothing in the statute that warrants this contention. The statute in no way indicates that a subsequent locator shall not make similar measurements from his own trap in order to determine if another existing trap comes within a distance of nine hundred feet measured laterally from his own. Indeed, we think the manifest purpose of the statute cannot be met without his observance of such measurement, for it clearly means that there must be a distance of nine hundred feet *between* all traps laterally considered from either side. It is argued that the legislature of 1899 provided a method for measuring end passageways which required the measurements to be made with reference to prior existing traps. While that is true, yet it has never provided any such method for determining lateral passageways and distances.

Respondent cites the case of *Point Roberts Fish. Co. v. George & Barker Co.*, 28 Wash. 200, 68 Pac. 438. The case is cited as showing that the court determined the passageway by measurements with reference to the prior trap. The court simply attempted to follow the method designated in the statute, which was complex and difficult to apply. That method was repealed at the session of 1905. But, whatever methods the legislature may have adopted for determining end passageways, it has never designated any particular method for determining lateral distances and passageways. We see nothing in the above case, or in any others cited, to support respondent's view that he is not required to measure laterally from his own trap to determine if he is within nine hundred feet of another. Since less than that distance intervenes laterally between his and appellant's traps, both traps cannot lawfully be maintained. Respondent's trap being the newer one is therefore the unlawful one.

Respondent's answer admits that his trap has caught salmon that would otherwise, and but for the existence of his trap,

have been caught by the appellant's trap; and it is also admitted that such will continue to be the case in the future if respondent's trap is maintained at its present location. Under the previous decisions of this court, appellant is therefore entitled to maintain this action to enjoin the maintenance of respondent's trap at its present location.

What may have been the policy or purpose of the legislature in requiring these passageways is immaterial. Appellant argues that, with reference to the waters of Baker's bay and the Columbia river, it was for the purpose of giving a greater number of fish an opportunity to escape the traps and proceed up the river to spawn, thereby perpetuating a greater number of fish for future years. The additional argument might be applied to Puget Sound, that the larger passageways there required were intended to serve the purposes of navigation. But whatever may have been the purpose was a matter of legislative policy, and the duty of the courts is to see that the requirements are observed.

The judgment is reversed, and the cause remanded, with instructions to vacate the judgment and enter an order sustaining the demurrer to the answer.

MOUNT, C. J., CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5897. Decided January 9, 1906.]

NATHAN DEGGINGER, *as Receiver of Stumpf & Morgan, Respondent,* v. SEATTLE BREWING AND MALTING COMPANY *et al., Appellants.*[1]

INTOXICATING LIQUORS—LICENSE—ASSIGNABLE AS PROPERTY. An unexpired municipal license to sell liquor for the term of one year, paid for in advance, and which may be transferred by consent of the city upon the observance of certain formalities, is property that is assignable, and passes upon the insolvency of the licensee to a receiver for the benefit of creditors.

PLEDGES—LIQUOR LICENSE—AGREEMENT PLEDGING AS COLLATERAL SECURITY—FAILURE TO FILE OR RECORD—EFFECT AS TO CREDITORS—STATUTES. A pledge of an unexpired liquor license left in the possession of the licensee is void as to creditors, whether construed as a chattel mortgage or as a bill of sale, when it was not recorded as a chattel mortgage as required by Pierce's Code, § 6549, nor as a bill of sale as required by Bal. Code, § 4578.

Appeal from an order of the superior court for King county, Frater, J., entered June 22, 1905, after a hearing upon affidavits, restraining the transfer of a liquor license, and directing the delivery of the certificate of license to the plaintiff as receiver. Affirmed.

G. M. Emory and *Scott Calhoun,* for appellants.

Allen, Allen & Stratton, for respondent.

MOUNT, C. J.—This appeal is from an order of the lower court temporarily restraining the defendants from transferring a retail liquor license issued by the city to one I. G. Morgan, and directing the Seattle Brewing & Malting Company to deliver the paper evidence of said license to the respondent. It appears from the complaint and the affidavits filed at the hearing that, on December 20, 1904, the city of Seattle issued to I. G. Morgan, of the firm of Stumpf & Morgan, copartners, a retail liquor license, authorizing the

[1]Reported in 83 Pac. 898.

sale of liquors at retail for the term of one year, at No. 1222 Second avenue, at what is known as the "Brooklyn Cafe," in said city. The consideration for such license was $1,000, which was paid in advance. The money for the purchase of this license was furnished to Stumpf & Morgan by the Seattle Brewing & Malting Company. Morgan agreed to repay this money in monthly payments of $100 each until the amount due was fully paid, and to secure the repayment executed an agreement as follows:

"Collateral Pledge of License. Seattle, Washington, December 9, 1904.

"For and in consideration of money advanced and guarantees made in my behalf and for me, and for and in consideration also of the notes hereto attached, made payable by me to the said Seattle Brewing & Malting Co., I do hereby pledge all interest, claim or demand of whatsoever nature, I have now or may have in any sum of money or in any interest in that certain license of the city of Seattle directed to me, permitting the sale of intoxicating liquors at that certain place known as Brooklyn Cafe, and I do authorize said Seattle Brewing & Malting Co., for the better securing to it of the full payment of any and all indebtedness of any kind whatsoever that may be due it from me, to take possession and control, by any means convenient, and with as little expense to me as possible, of any claim or interest in any money growing out of the said license, or of any interest in said license. The said license herein intended to be treated as a collateral pledge for the better securing of my indebtedness to the said Seattle Brewing & Malting Co., and I do hereby waive any proceedings of foreclosure upon the same, and direct that upon my failure to pay my indebtedness to the said Seattle Brewing & Malting Co., as agreed by the oral understanding, and by the terms and conditions of the annexed notes by me made, the said Seattle Brewing & Malting Co. is then and there to take possession of all interest I have in any manner or form in said license, and take possession and control of the said license as the said Seattle Brewing & Malting Co., shall see fit, without expense and without suit, the license certificate being left in possession of the pledgee

herein for the purpose of complying with ordinance No. 4205. "Witness: Charles A. Thorndyke. (Signed) I. G. Morgan."

After the license was issued, a retail liquor saloon was conducted by authority of the license at the place therein described, by the firm of Stumpf & Morgan. On January 17, 1905, certain creditors of Stumpf & Morgan brought an action against them and attached all the property of the firm, including the saloon known as the Brooklyn Cafe, and took possession thereof. The retail liquor license was at that time hanging upon the wall of the saloon. On January 21, 1905, an agent of the Seattle Brewing & Malting Company obtained possession of the license certificate by taking it from the saloon. On January 26, 1905, respondent was appointed receiver of the assets of Stumpf & Morgan, and duly qualified, and thereupon demanded the possession of the license certificate, which was refused. The Brewing and Malting Company, on January 27, 1905, presented to the city a petition, signed by themselves and said Morgan, for a transfer of said license to one Nick Kennedy, and also asking for a change of location for the use of the license. The ordinances of said city provided for a transfer of an unexpired license, and for a change of location by consent of the city, upon application therefor, and upon the observance of certain formalities. The city was about to make the transfer, when the respondent, as receiver, brought this action for a restraining order and for possession of the certificate of license.

Appellants argue that the license, or the right to do business, in controversy is a personal privilege conferred by the city upon the licensee, and is not such property as is subject to debts of the licensee, and that none of the rights secured thereby can be enjoyed by the receiver; that the license is merely an intangible privilege. A number of the state courts have held in accord with this position of the appellants. See: *Voight v. Board of Excise Com'rs,* 59 N. J. L. 358, 36 Atl. 686; *Feigenspan v. Mulligan,* 63 N. J. Eq. 179, 51 Atl. 191; *State v. Lydick,* 11 Neb. 366, 9 N. W. 560, and cases

there cited; *Bonnie & Co. v. Perry's Trustee* (Ky.), 78 S. W. 208; Black, Intoxicating Liquors, § 130. This rule is based upon the idea that the right is a species of public trust conferred only upon those who possess certain qualifications; that it is a police regulation, and is therefore in no sense property. Under statutes which do not permit transfers of the license from one person to another, and where the right is a personal privilege only, we think the rule stated is undoubtedly correct. But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality.

The United States courts have held that liquor licenses issued under statutes authorizing a transfer are assets of an estate under the bankruptcy act. *Fisher v. Cushman,* 43 C. C. A. 381, 103 Fed. 860; *In re Becker,* 98 Fed. 407; *In re Fisher,* 98 Fed. 89; *In re Brodbine,* 93 Fed. 643; *In re Gallagher,* Fed. Cas., No. 5,192. Mr. Black, in discussing these cases and the question involved in this action, in his note appended to the case of *Fisher v. Cushman, supra,* at page 392, says:

"If these questions [referring especially to franchises to collect tolls and the like] should again arise, it is probable that they would be decided in accordance with the rule laid down in regard to liquor licenses; the true test being found in the question whether the franchise or right is actually transferable, with the consent of the authorities and without any practical difficulty, and whether it has a market value and can be disposed of by sale."

This, it seems in reason, must be the correct rule. If a license to sell liquors is transferable, valuable, and is subject to sale, it is certainly not a merely personal privilege; but it has all the attributes of property except tangibility, and must be treated as property. *People v. Durante,* 45 N. Y. Supp.

1073. In this case the ordinance under which the license was issued provided for a transfer of the license upon the observance of certain formalities about which there is no practical difficulty. The license fee was $1,000, payable in advance and was so paid in this case. The license was good for one year from its issue. At the time the receiver took possession of the business, the license had run only about one month. The license or right to do business, therefore, had a marketable value of about $900. Under these circumstances the license was more than a personal privilege. It was valuable personal property, and an asset of the firm of Stumpf & Morgan.

Appellants contend that the Brewing Company is entitled to the license under the contract or collateral pledge quoted above. We think this contention is without force as against creditors. The agreement was neither executed, acknowledged, filed, nor recorded as required by law, and the license certificate was left in possession of Stumpf & Morgan. It has been held that a contract of this kind constituted an equitable mortgage which was not included within a statute requiring mortgages upon *"goods and chattels"* to be filed, upon the ground that a liquor license did not fall within the classification of goods and chattels, and would therefore be enforced. *Niles v. Mathusa,* 20 App. Div. 483, 47 N. Y. Supp. 38. Our statute, however, provides that "mortgages may be made upon all kinds of personal property" (Pierce's Code, § 6549), and "every such instrument, within ten days from the time of the execution thereof, shall be filed in the office of the county auditor" (Pierce's Code, § 6550). No transfer of personal property shall be valid as against creditors where the property is left in possession of the vendor unless the bill of sale is recorded within ten days after such sale. Bal. Code, § 4578. We have held above that the license was personal property. Whether we construe the contract as a bill of sale or a chattel mortgage, it did not conform to the statute in either event, and was void as to creditors.

It follows, upon the showing made, that the receiver was entitled to the possession of the certificate of license for the benefit of creditors, and that the court properly restrained the transfer thereof by the appellants. The order appealed from is therefore affirmed.

CROW, ROOT, DUNBAR, HADLEY, and FULLERTON, JJ., concur.

[No. 5763. Decided January 9, 1906.]

CORS & WEGENER, *Plaintiff*, v. BALLARD IRON WORKS, *Defendant*, RAILWAY AND STEEL SUPPLY COMPANY, *Appellant, and* JOHN S. DARVILLE *et al., Respondents.*[1]

RECEIVERS—CLAIMS FOR LABOR—ALLOWANCE—CORPORATIONS—EMPLOYMENT OF STOCKHOLDERS—MEETINGS—RESOLUTIONS—EFFECT. Upon the receivership of an insolvent corporation, a general creditor cannot defeat the allowance of preferred claims for labor, performed by various stockholders in the capacity of employees within six months from the appointment of the receiver, by an objection to the validity of a stockholder's resolution fixing certain compensation for such stockholders, where there was sufficient evidence to sustain the finding that the resolution was never acted upon by the corporation, and was waived by the stockholders, and that they were regularly credited with the reasonable value of the services rendered by them; and the conclusion of law that they were entitled to preferred claims was proper.

Appeal from an order of the superior court for King county, Frater J., entered March 15, 1905, in favor of labor claimants, after a hearing upon the receiver's report for the allowance of claims. Affirmed.

Ballinger, Ronald, Battle & Tennant and *F. E. Brightman*, for appellant.

Graves, Palmer, Brown & Murphy and *Aust & Terhune*, for respondents.

[1]Reported in 83 Pac. 900.

Crow, J.—On or about October 27, 1904, an order was made in this action, appointing one H. R. Clise as receiver of the defendant, the Ballard Iron Works, a corporation. At said time the respondents John S. Darville, William Darville, and Charles House, stockholders in said corporation, and respondents R. M. Darville and R. J. Darville were all in its employ, having considerable sums of money due them for their personal services, as shown by books of said corporation. In compliance with an order of court, respondents filed their claims with said receiver, asking that the same be allowed as preferred claims for all sums severally due them for services rendered within six months prior to his appointment. The plaintiff, Cors & Wegener, a corporation, and the appellant Railway & Steel Supply Company, a corporation, as general creditors, objected to any allowance of said claims, but especially opposed their allowance as preferred claims. The receiver's report being presented to the court, a hearing was had for the purpose of determining whether said claims were entitled to allowance, and if allowed, were entitled to any preference.

Evidence was admitted and findings of fact were made by the trial court, from which it appears, that in August, 1902, said Ballard Iron Works was incorporated with a capital stock of $5,000; that at said time said John S. Darville, as a stockholder, was elected president, said William Darville as a stockholder was elected manager, and said Charles House as a stockholder was elected foreman of the foundry; and from said time until October 26, 1904, severally continued in such employments; that on September 15, 1902, at a special meeting of the stockholders of said Ballard Iron Works, at which all the stockholders were present, the following resolution was regularly passed and adopted:

"Ballard, Washington, Sept. 15, 1902.

"Upon a call from the president, the stockholders of the Ballard Iron Works met in special session, at the office of said company, at Fourth and Shilshole avenues, Ballard, Wash-

ington, on the 15th day of September, 1902. The meeting was called to order at eight o'clock Monday evening with President John S. Darville in the chair. The following stockholders being present: John S. Darville, William Darville, Charles House, Paul Hopkins, Andrew Anderson and E. J. Hopkins. The objects of the meeting being to settle the compensation of the stockholders working in the employ of said company, the following motion was made by Paul Hopkins and properly seconded and carried by Andrew Anderson; that William Darville as acting manager of the company receive one hundred ($100) dollars per month; John Darville, receive three and 50-100 ($3.50) dollars per day; and Chas. House receive four ($4) per day, provided that the business made this amount over and above all expenses. There being no further business before the meeting, the same was adjourned in proper form;"

that said resolution was transcribed into the minutes of the meetings of said stockholders; that all parties connected with the business management of said Ballard Iron Works thereafter treated said resolution as a nullity, and by crediting said John S. Darville, William Darville, Charles House, and others with the full amounts of wages severally due them, waived its provisions; that from the 15th day of September, 1902, until the date of the appointment of said receiver, a period of more than two years, said John S. Darville, William Darville, and Charles House had been credited with their salaries, and that said entries were made upon the books of said Ballard Iron Works, under the direction of said claimants and of the secretary of said company; that said incorporation never did a paying business; that the services actually rendered by said claimants were of the reasonable value and amounts credited to them respectively; that at the time of the appointment of said receiver there was due from said corporation for wages to said several claimants the following sums: John S. Darville, $467.55; William Darville, $585.31; R. M. Darville, $171.10; R. J. Darville, $97.20; Charles House, $333.27; that each of said claimants was at the time of the appointment of said receiver regularly in the

employ of said corporation and had been continuously so employed for more than six months prior thereto; that of the amounts so due said claimants, the following sums were due to each respectively, for wages earned within a period of six months prior to the appointment of said receiver: John S. Darville, $379.77; William Darville, $585.31; R. M. Darville, $109.80; R. J. Darville, $97.20; Charles House, $333.27; that the following additional sums were also due for wages earned within the year immediately preceding said period of six months: John S. Darville, $87.78; R. M. Darville, $61.30; that immediately upon the appointment of said receiver, said House filed with the auditor of King county a notice of lien for his claim, and that each and all of said claimants filed with the receiver their several claims in conformity to law and the order of the court.

Upon said findings, conclusions of law, and an order of distribution were made, allowing as preferred claims the amounts severally due said respondents for their services rendered within the six months prior to the appointment of the receiver (Bal. Code, §§ 5919-5923), and allowing as general claims the additional amounts found due respondents John S. Darville and R. M. Darville, for services rendered by them prior thereto. From said order said Railway & Steel Supply Company, as a general creditor, has appealed.

The only assignments of error are that the trial court erred in making said findings of fact, except the finding that said resolution was regularly adopted at the stockholders' meeting on September 15, 1902, upon which resolution appellant now relies to defeat said claims; also, that the court erred in its conclusions of law and the final order made. Upon argument appellant's main contention is that the court erred in its finding to the effect that all parties connected with the business and management of the Ballard Iron Works treated said resolution of September 15, 1902, as a nullity, and by crediting the full amount of wages to the several respondents herein, waived the provisions of said resolution;

appellant insisting that said finding is not supported by the evidence.

We have carefully examined all the evidence and conclude that all of the findings made by the honorable trial judge are fully sustained. The conduct of all the stockholders and interested parties, during the entire period of more than two years from the date of the adoption of said resolution to the date of the appointment of said receiver, shows that said resolution was not followed or observed in any respect by them. Amounts due the several employees, whether stockholders or not, were regularly credited to them upon the books, and although not settled in full, partial payments were regularly made thereon from time to time as they needed funds. Not only was this done, but the capital stock was afterwards increased, and thereupon respondents William Darville and John S. Darville each subscribed for additional stock to the amount of $500, and paid for the same with their earnings, the stock being charged to them upon the books of the company. There is no evidence showing or tending to show that appellant, as a creditor, ever knew of said resolution before the appointment of said receiver, or that it in any way relied on the same in extending credit to said Ballard Iron Works. The only question here involved is one of fact, and having determined that the findings made by the court are all supported by the evidence, we think the conclusions of law and final order made necessarily follow.

The judgment is affirmed.

Mount, C. J., Dunbar, Hadley, and Fullerton, JJ., concur.

Root, J., having been of counsel, took no part.

[No. 5837. Decided January 9, 1906.]

R. Lee Purdin *et al., Respondents,* v. Washington National Building, Loan, and Investment Association, *Appellant.*[1]

Mortgages—Priority Over Liens for Irrigation Assessments—Failure to Foreclose. Where a mortgagee has taken a deed of the mortgaged premises in satisfaction of the mortgage, which was never foreclosed, he cannot claim that his interest is prior and paramount to that of a lien for irrigation assessments, where the date of his conveyance does not appear.

Irrigation—Organization of District—Collateral Attack. The organization of an irrigation district cannot be collaterally attacked in a proceeding to determine the priority of the liens of irrigation assessments over a mortgage on the premises assessed.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered January 26, 1904, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Kauffman & Frost, for appellant.

Root, J.—Respondents commenced this action to recover possession of certain real property, to which they claim title under a sale for delinquent district taxes levied by the Middle Kittitas Irrigation District, organized under the act of March 20, 1890 (Laws 1889-90, p. 671). The defendant claims title to said property, with right of possession, as successor in interest to the persons owning said property at the time of the creation of said irrigating district, there being upon said property at that time a mortgage which was subsequently paid and satisfied by the owners making a deed of conveyance of said property to the mortgagee, this defendant, who accepted the same in satisfaction of said mortgage without any foreclosure proceedings being had. Appellant interposed two

[1]Reported in 83 Pac. 723.

affirmative defenses: (1) That its interest in said land attached prior to, and is paramount to, the title obtained by the sale for delinquent district taxes; (2) that the irrigation district was not legally organized because the petition for its organization did not carry the number of signatures which the law requires. No question is made of the regularity of the tax proceedings which culminated in the deed to respondents' grantor. In the lower court judgment went in favor of the plaintiffs, from which judgment defendant appeals.

Appellant contends that the taxes levied by the irrigating district could in no manner have preference over the mortgage lien which was upon the property at the time of the creation of the district, and that there is nothing in the statute authorizing the creation of such districts which gives taxes levied thereby a preference over prior liens. It is not necessary to determine this last contention at this time. The mortgage upon the premises was never foreclosed; consequently the interest acquired by respondents and their grantors was never decreed to be subordinate to said mortgage lien, or in any manner foreclosed by the owner of said mortgage. Appellant claims that the district was not created until August 3, 1891, on which day the commissioners of the county made and entered the order creating an irrigating district. The mortgage was given on July 27, 1891. The date of transfer from the mortgagor to the mortgagee does not appear. We can find nothing in the record showing appellant's title to be equal, or paramount, to that of respondents.

As to the contention that the district was not legally organized, we do not think that appellant can raise that question in this proceeding. Such an attack cannot be made collaterally. In the case of *Miller v. Perris Irrigation Dist.*, 85 Fed. 693, the United States circuit court for the southern district of California, in a case involving questions very similar to this before us, among other things said:

"The rule, sustained by the overwhelming current of authorities, and based on considerations of public policy, is

that, where a reputed corporation is acting under forms of law, unchallenged by the state, the validity of its organization cannot be drawn in question by private parties. Corporate franchises are grants of sovereignty only, and if the state acquiesces in their usurpation, individuals will not be heard to complain. Neither the nature nor extent of an illegality in its organization can affect the existence of a reputed corporation, if the requisites just stated are present; that is, if such corporation be acting under color of law, and the state makes no complaint. Where these requisites concur, there is a *de facto* corporation. Such corporation may legally perform every act which the same entity could perform, were it a corporation *de jure*. *People v. La Rue,* 67 Cal. 526, 8 Pac. 84."

The principle laid down in the case just cited seems to be the one generally accepted and followed by the courts in cases of this kind. *Dean v. Davis,* 51 Cal. 406; *Quint v. Hoffman,* 103 Cal. 506, 37 Pac. 514; *Norton v. Shelby County,* 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Rothchild Bros. v. Rollinger,* 32 Wash. 307, 73 Pac. 367.

We think that the judgment of the superior court was correct, and it is therefore affirmed.

MOUNT, C. J., CROW, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

[No. 5767. Decided January 9, 1906.]

A. J. DRUGLIS, *Respondent*, v. NORTHWESTERN IMPROVEMENT COMPANY *et al.*, *Appellants*.[1]

APPEAL—REVIEW—VERDICT UPON CONFLICTING EVIDENCE. The verdict of a jury upon conflicting evidence upon an issue as to negligence is conclusive on the supreme court after the refusal of the lower court to grant a new trial.

MASTER AND SERVANT—NEGLIGENCE—INJURY TO MINER BY FALL OF ROCK—FURNISHING PROPS—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a miner from the alleged fall of rock in a mine, the question of the negligence of the defendant is for the jury, where there was evidence that no props were furnished to the plaintiff, as required by statute, although he had demanded the same; and the defendant is not entitled to a nonsuit by reason of conflicting testimony to the effect that there were sufficient props provided, and that the plaintiff had stated at the time that his injury was due to other causes.

SAME—VIOLATION OF STATUTORY DUTY—ASSUMPTION OF RISK. An employee in a mine does not assume the risks of injury by reason of defendant's failure to perform the statutory duty of furnishing sufficient props.

SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction in a personal injury case to the effect that the defendant would be liable for an injury caused by its negligence, if the plaintiff was "without any greater want of care, prudence and skill . . . than was reasonably to be expected from a person of ordinary care," etc., is not prejudicially erroneous, although not as clear as it should have been upon the subject of contributory negligence.

Appeal from a judgment of the superior court for Pierce county, Rice, J., entered September 22, 1904, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a miner through the falling of overhanging rock in a mine. Affirmed.

B. S. Grosscup and *A. G. Avery*, for appellants.

Govnor Teats, Frank B. Sayre, and *Otis W. Brinker*, for respondent.

[1]Reported in 83 Pac. 101.

MOUNT, C. J.—Action for injuries. Plaintiff recovered a judgment for $1,000 in the court below. Defendant appeals.

Plaintiff was employed as an experienced miner to mine coal in defendants' coal mine near Roslyn, Washington. The vein of coal where plaintiff was employed was about four feet ten inches, in thickness. Next above this vein of coal was a sandstone formation, about twelve inches thick, lying flat upon the vein of coal. A seam separated this sandstone from the coal on the lower side, and a seam likewise separated the sandstone from the hard country rock on the upper side. Above this sandstone formation was continuous hard, solid rock. The method pursued in mining was to break down the coal in the face of the working by means of blasts. When the coal was broken down, the sandstone cap rock remained in its place. The miner then examined the sandstone cap rock above by means of a bar or pick, to see that it was safe. An experienced miner could tell by tapping the cap rock whether it was safe or not. If it was not safe, he put props under it, and then shoveled back the coal which was broken down by the blast. If it was safe, he did not use the props. Generally, however, the props were used, and after the coal was shoveled back toward or into a car, which was furnished for the purpose of being loaded with coal, the props were removed, and the miner proceeded to break down the cap rock, which was thereupon piled up at one side of the "room" where he worked.

This cap rock was usually broken down by driving an iron wedge into the seam between it and the solid rock above. Sometimes it could be pried down with a bar without the use of the wedge. When it could not be broken down in either of these ways, it was broken down by a blast of black powder. It was always necessary, and was a part of the miner's duty, to take down and carefully pile away this cap rock, which was done immediately after the coal was shoveled from under it. The props which were used to hold up the projecting cap

rock while the loose coal broken down from the face of the vein was being removed, were furnished to the miners by car drivers upon request of the miners. On the 17th day of June, 1903, while the plaintiff was at work in the mine, a piece of cap rock fell upon, or rolled against, his right leg, and broke it. Thereafter he brought this action, alleging negligence of the defendants in two particulars; first, in providing for the excavation of a room of unsafe size; and second, in failing to provide timbers to enable plaintiff to safely prop his working place, as required by statute. The answer denied the allegations of negligence, and pleaded affirmatively contributory negligence and assumed risk.

The first charge of negligence was abandoned at the trial. The evidence as to how the accident happened and as to whether or not there were props furnished to the plaintiff, and whether or not plaintiff requested props from the drivers, or defendant Forsythe, is in irreconcilable conflict. The plaintiff's evidence was to the effect, that he was injured while shoveling coal; that no props were furnished him; and that he had demanded props from both the driver and defendant Forsythe, whose duty it was to furnish the props to the drivers to be delivered to the miners. The defendants' evidence was to the effect that, at the time of the injury, plaintiff told a number of witnesses that he was injured while wedging down the cap rock. These witnesses also testified that the coal was all cleaned out from under the cap rock, and that the wedge mark was plainly visible where the cap rock had been broken down. Defendants' evidence also tended to show that there were an abundance of props at hand for plaintiff's use, and that he had made no demand for props. The jury returned a verdict in favor of the plaintiff.

Appellants contend that the court erred in refusing to direct a verdict in favor of each of the appellants. As stated above, the evidence was in direct conflict upon each of the vital points in the case. It was, therefore, under repeated

rulings of this court, for the jury to determine the facts. The jury did so, and found in favor of plaintiff. The judge who saw and heard the witnesses refused to grant a new trial. The facts must therefore stand as found by the jury in favor of the plaintiff.

A large part of appellants' brief is devoted to the question of assumption of risk, and we are urged to overrule the case of *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310. The appellants' brief in this case was filed before the decision in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, and was considered by us in that case, because of the able argument it contained upon the question then at issue. But we then concluded not to change the rule laid down in *Green v. Western American Co.*, and since that time we have recently decided two other cases following the rule of *Green v. Western American Co.* and of *Hall v. West & Slade Mill Co., supra.* Those cases are *Whelan v. Washington Lumber Co., ante* p. 153, 83 Pac. 98, and *Hoveland v. Hall Bros. Marine R. etc. Co., ante* p. 164, 82 Pac. 1090. The rule has therefore become the settled rule of decision upon the question of assumption of risk in this class of cases.

Appellants assign several errors upon the instructions, besides those relating to the assumption of risk. These assignments are technical in their nature and we think are without sufficient substance to constitute reversible error. Some of the criticisms upon the language used by the court are probably justified; but, taken as a whole, the jury could not have been misled by the instructions. For example, the following instruction was given:

"You are instructed that, in determining the question of negligence in this case, you should take into consideration the conduct and situation of both parties at the time of the alleged injury as disclosed by the evidence, and if you believe from the evidence that the injury complained of was caused by the negligence of defendants as charged in the complaint,

and without any greater want of care, prudence, and skill on the part of the plaintiff than was reasonably to be expected from a person of ordinary care, prudence, and skill in the situation in which he found himself placed, then the palintiff will be entitled to recover."

It is claimed that this instruction means that the plaintiff may have been guilty of some negligence and yet recover. We think the instruction is not susceptible of that construction. The court evidently meant to tell the jury that, if they believed the plaintiff was using ordinary care, prudence, etc., or, in other words, that the plaintiff himself was not negligent, then he could recover. The words used to express that idea did not do so as clearly as they might have done, but the meaning is manifest, and we think did not constitute reversible error. Without considering each one of the instructions separately, we think it is sufficient to say that, taken together as a whole, they fairly gave the law of the case to the jury, and that there is no reversible error therein.

After a careful reading of the evidence, we are not impressed with the merits of plaintiff's case, but, since the jury found the material facts in favor of the plaintiff, after seeing and hearing the witnesses, whose testimony was conflicting, and since the trial judge refused to grant a new trial, and also since we find no reversible error of law in the record, the judgment must be affirmed.

DUNBAR, HADLEY, and FULLERTON, JJ., concur.

RUDKIN, ROOT, and CROW, JJ., concur, on the authority of *Hall v. West & Slade Mill Co., supra.*

[No. 5781. Decided January 9, 1906.]

George R. E. Monk *et al.*, *Appellants*, v. Fred Duell *et al.*, *Respondents*.[1]

Vendor and Purchaser — Contract for Sale — Construction — Option and Not an Agency—Rights of Purchasers. A contract whereby the owner of premises agrees to sell the same amounts to a conditional sale or option, and does not constitute the vendee an agent for the sale of the premises, where it was provided that the vendee was to have six months in which to resell the premises, and deposit $145 per lot, net to the owner, in a bank, less five per cent commission, and where the time was extended from time to time and the owner made deeds to various purchasers of lots resold by said vendee; hence the contracts made by said vendee on receipt of installments of purchase money, without depositing the same in bank and completing his purchase, which was subsequently declared forfeited, are not sufficient to pass any title, or to compel the owner to make conveyances as for sales made by an agent.

Bona Fide Purchaser—Improvements—Recovery for on Failure of Purchase. *Bona fide* purchasers of real estate from an unauthorized agent, who take possession of vacant and unoccupied land in good faith, are entitled to recover the value of improvements if the same were made after the enactment of Laws 1903, p. 262, and not for improvements made prior thereto.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 3, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Reversed.

Shank & Smith, for appellants.
Winsor & Hadley, for respondents.

Crow, J.—This is an action in ejectment, instituted by George R. E. Monk and Anna Monk, his wife, appellants, against Fred Duell, Ella Duell, his wife, and Nelson Duell, respondents, to recover possession of certain real estate in

[1]Reported in 83 Pac. 313.

King county. From a judgment in favor of respondents this appeal has been taken.

The action was tried to the court without a jury. Brief findings were made in favor of respondents, and findings requested by appellants were refused. From the evidence we find, that on March 26, 1902, appellants George R. E. Monk and Anna Monk, his wife, entered into a written contract with one Henry Siepman, as follows:

"Articles of Agreement made and entered into this 26th day of March, one thousand nine hundred and two (1902), between Geo. R. E. Monk, of the City of Seattle, King county, state of Washington, party of the first part, and Henry Siepman, of the city of Ballard, King county, state of Washington, party of the second part.

"Witnesseth: It is hereby agreed by and between the above named parties, that Geo. R. E. Monk, party of the first part, is the owner in fee simple of lots 8, 9 and 10 in block number nine (9), lots number one (1) to fourteen (14) inclusive, in block number eight (8) and lots number nineteen (19) to twenty-four (24) inclusive in block number three (3), Sander's Addition to Gilman Park and Salmon Bay, and he agrees to sell the same to Henry Siepman, the party of the second part, for the sum of three thousand three hundred and forty ($3,340) dollars within six (6) months from the above date. It is also agreed and understood that Henry Siepman in this six (6) months is to sell the above named lots in the above named blocks at not less than one hundred and forty-five ($145) dollars per lot net to the party of the first part. All money received by the party of the second part is to be placed in the Boston National Bank of the city of Seattle to the credit of the party of the first part, less the five (5) per cent commission, and after six (6) months the party of the first part is to turn over to the party of the second part all money above one hundred and forty-five ($145) dollars per lot sold; also the party of the second part is to assume all lots not sold and pay the party of the first part the sum of one hundred and forty-five ($145) dollars for the lots not sold. In case the party of the second part does not fulfill his agreement, then this agreement is to be null and void."

that at the expiration of said six months, an extension of thirty days was given to Siepman and indorsed upon the contract; that thereafter the contract was further verbally extended from time to time for several months, and then forfeited for nonperformance by Siepman; that on or about March 21, 1903, the said Henry Siepman entered into a written contract with respondent Nelson W. Duell, whereby he agreed to sell to said Duell lot 2 in block 8 of said Sander's addition to Gilman Park and Salmon Bay, for the sum of $175, payable in installments, $25 in cash, and $10 on the 21st day of each month thereafter until the full purchase price should be paid; that said contract was in usual form, did not mention or allude to appellants, but purported upon its face to effect a sale from said Henry Siepman, as vendor, to said Nelson W. Duell, as vendee; that on or before September 21, 1903, said Henry W. Duell by installments had paid Siepman thereon purchase money to the total amount of $85; that on said March 21, 1903, said Henry Siepman also executed and delivered to respondent Fred Duell a like written contract, whereby he sold Fred Duell lot 1, in said block 8, for the sum of $200, payable in installments, $25 in cash, and $10 on the 21st day of each month thereafter, upon which said Fred Duell had, on or before September 21, 1903, made payments by installments to the total amount of $85; that on March 24, 1903, said Henry Siepman also executed and delivered to respondent Ella Duell a like written contract for lots 7 and 9, in said block 8, for the sum of $350, payable in installments, $175 in cash and $20 on the 24th day of each month thereafter, upon which said Ella Duell had, on or before May 27, 1903, made payments in installments to the total amount of $275; that said Henry Siepman never had any record title to said real estate, nor was the contract between him and appellants placed of record; that said respondents made no examination of the title, but were informed by one Keene, who acted as agent for said Siepman,

that the title was good, without naming the party in whom the record title stood; that prior to making said sales to respondents, said Siepman had made cash sales of other lots for prices of more than $145 each, paying to appellants Monk the money received therefor, instead of depositing the same in the bank; that thereupon appellants had immediately executed and delivered their deeds conveying said lots directly to the several purchasers; that Siepman never informed Monk of said sales to respondents, nor did he ever deposit in bank or pay to Monk any of the installments of purchase money which he had collected from respondents; that some time in August, 1903, said Monk first learned of said sales, and immediately notified respondents that Siepman had no authority to make such contracts, whereupon respondents ceased making payments to Siepman; that immediately thereafter said Monk, through his attorneys, made unsuccessful efforts to reach some adjustment, in order that respondents might be protected; that afterwards, on or about October 13, 1903, appellants demanded possession of said real estate, which being refused this action was commenced.

Respondents pleaded said contract between appellants and Siepman; also, said contracts between Siepman and themselves; alleged that Siepman was the agent of Monk, with authority to make said contracts of sale; alleged that valuable improvements had been made by them upon the lots, without stating the exact dates of such improvements; and alleged that they had tendered the remainder of the purchase money to appellant Monk, and that they were still ready, willing, and able to pay the same. Upon trial appellants contended, that the contract between themselves and Siepman was merely an option to Siepman to purchase said real estate; that it did not constitute Siepman their agent to sell said real estate, or, in any event, if he should be construed to be their agent, he had no authority to sell on installment contracts, or to give any contracts. Respondents contended that,

by said contract, Siepman became the agent of appellants, with full authority to make said sales to respondents, and that such sales were afterwards ratified by appellants. The evidence, however, utterly fails to show any such ratification.

The rights of the parties herein must be determined by a proper construction of the contract between Monk and Siepman, which is exceedingly vague and difficult to understand. After a careful examination of its terms, in the light of the evidence showing the construction placed thereon by the actions of Monk and Siepman, we have concluded it was a contract of sale; that Siepman was to purchase all of the lots therein described, within six months from its date; that for the purpose of enabling him to perform the contract, he was granted the privilege of negotiating sales of separate lots, not on time but for cash, being required to promptly pay into bank for Monk the entire proceeds of such sales, as and when made, less a five per cent commission, with the understanding, however, that the amount so turned in should in no instance net Monk less than $145 for each lot sold. It was evidently contemplated that Siepman might, from time to time within said six months, sell lots for much larger prices than $145 each—in fact, he did this—and that, when he did so, it became his immediate duty to turn the entire proceeds over to Monk, less the five per cent commission. The contract also provided that, at the expiration of said six months, Monk should account to Siepman for all the proceeds of such previous sales, over and above the sum of $145 per lot, provided, however, that Siepman should then fully complete his contract by paying for all unsold lots at $145 each. It is true, a commission is mentioned, but our understanding of the purpose of this is that, whereas Siepman might, and did, sell lots for cash for sums in excess of $145 each, he would thereby be compensated for such sales which would inure to the benefit of Monk, in the event of the failure of Siepman

to fully complete his contract of purchase within the six months.

While the contract is indefinite, we conclude that Siepman was not authorized to sell lots upon installments; nor was he authorized to execute and deliver his own contracts of sale therefor. *Carstens v. McReavy,* 1 Wash. 359, 25 Pac. 471; *Armstrong v. Oakley,* 23 Wash. 122, 62 Pac. 499; *Samson v. Beale,* 27 Wash. 557, 68 Pac. 180. To hold that he might execute such contracts, and thereby bind appellants would be to hold that he could convey a better title or a greater right than he himself possessed. As Siepman's acts in making said installment sales to respondents were without authority, and as he was not the agent of appellants for any such purpose, appellants were not bound by his acts, nor compelled to give respondents credit for the purchase money collected by him. Before appellants demanded possession from respondents they had declared a forfeiture of their contract with Siepman by reason of his nonperformance. It appears that, at the time respondents purchased under their contracts with Siepman, the lots were vacant, unimproved, and not occupied by any person. We think the trial court erred in finding appellants were not entitled to possession of the real estate in dispute at the time of the commencement of this action.

The evidence shows that improvements of considerable value were made by respondents after they purchased from Siepman. There is no evidence, however, which definitely discloses the dates of such improvements. In 1903 an act entitled "An act for the protection of occupants of land who have in good faith made improvements and paid their taxes thereon," was passed by the legislature. Laws 1903, page 262. This act did not go into effect until June 11, 1903. We have held said act does not apply to improvements made prior to the date upon which it went into effect. *Investment Co. v. Hambach,* 37 Wash. 629, 80 Pac. 190; *Barton v.*

Wickizer, ante p. 293, 83 Pac. 312. Respondents, however, purchased in good faith, were holding in good faith under color or claim of title adversely to the claim of appellants, and their improvements were made in good faith. If such improvements were made on or after June 11, 1903, they would be entitled to recover therefor under the provisions of said act. If they were made prior to that date they are not entitled to recover.

There is evidence tending to show that some improvements were made prior to that date, while other evidence tends to show that some may have been made thereafter. It was respondents' duty to show the exact dates of the making of these several improvements. This they failed to do, perhaps for the reason that the case was tried for the purpose of determining who was entitled to possession of the real estate, and not so much with reference to the value of the improvements or time they were made. Justice should be done to all the parties, hence we do not feel that we should order final judgment.

It is ordered that the judgment of the superior court be reversed; that this cause be remanded, with instructions to the superior court to make a finding that appellants Monk and wife were entitled to possession of said real estate at the date of the commencement of this action, and with further instructions to permit the introduction of additional evidence for the purpose of ascertaining when the various improvements were made, with their value, and also the value of said lots, in order that the court may be enabled to enter final judgment and decree in accordance with the provisions of chapter 137, Laws 1903, p. 262, if the same shall be found to be applicable by reason of any of such improvements having been made after said act went into effect. The appellants will recover costs on this appeal.

MOUNT, C. J., DUNBAR, HADLEY, RUDKIN, and ROOT, JJ., concur.

[No. 5783. Decided January 10, 1906.]

AUGUST KRUG, *Appellant,* v. ELMER HENDRICKS, *Respondent.*[1]

BROKERS—COMMISSIONS FOR SALE OF RANCH—AUTHORITY TO NEGOTIATE SALE—EVIDENCE—SUFFICIENCY. In an action for a broker's commissions, a finding for the defendant will be sustained where the broker alone testified as to the existence of the contract, and he was contradicted by the respondent and two other witnesses.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered April 12, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for a broker's commission for the sale of land. Affirmed.

George A. Allen and *W. H. Jackson,* for appellant.

C. A. Mantz, for respondent.

PER CURIAM.—This suit was brought to recover the sum of $325, alleged to be due the plaintiff from defendant as a commission for services of the former as a real estate broker. The cause was tried by the court without a jury, and judgment was rendered for the defendant, dismissing the action; from which judgment the plaintiff has appealed.

The only question involved in the case is one of fact. The trial court found that appellant had not established, by a preponderance of the evidence, that a contract existed between the parties by which appellant was authorized to negotiate a sale at the time he claims to have rendered the services for which he seeks to recover. We have read the statement of facts and are satisfied that the court's finding is fully sustained by the evidence. There was conflict in the testimony. Appellant alone testified that there was any contract in existence at the time respondent sold his ranch. He was contradicted by respondent, and two other witnesses also testi-

[1]Reported in 83 Pac. 417.

fied as to admissions or statements made by appellant to the effect that he did not have the property listed at the time. Under such evidence, we shall not say that the trial court erred in holding that the weight of the testimony was with respondent.

The judgment is affirmed.

[No. 5900. Decided January 10, 1906.]

LAWYER LAND COMPANY, *Appellant*, v. ISABEL R. STEEL *et al.*, *Respondents*.[1]

APPEAL—DISMISSAL—NOTICE—FILING PRIOR TO SERVICE—HARMLESS ERROR. Under Bal. Code, § 6503, providing that an appeal shall be ineffectual if not filed within five days after service of notice, the notice of appeal may be filed before service, especially in view of Laws 1899, p. 79, providing that no appeal shall be dismissed for any defect in the notice or service thereof.

PROCESS — SUMMONS — SERVICE BY PUBLICATION — FORM — SUFFICIENCY. A summons by publication in the statutory form, served upon a defendant outside of the state, is not defective by reason of containing the clause requiring the defendant to appear in twenty days after the service if service shall be made within the state, which clause may be treated as surplusage.

APPEAL—REVIEW—ERROR URGED BY RESPONDENT WITHOUT CROSS-APPEAL. Upon appeal from an order quashing a summons, entered solely upon the ground that the summons was defective in form, the respondents cannot, without taking a cross-appeal, urge error in refusing to grant the motion to quash the summons upon other grounds, to which they took exception.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered June 12, 1905, on motion of the defendants, quashing a summons and the service thereof. Reversed.

E. H. Belden, for appellant.

Danson & Williams, for respondents.

[1]Reported in 83 Pac. 896.

HADLEY, J.—Respondents moved to dismiss this appeal, on the ground that the notice of appeal was first filed and afterwards served. Bal. Code, § 6503, states that, when the appeal is not taken at the time of the rendition of the judgment, it may thereafter be taken by the service of written notice and, within five days after such service, the original notice or a copy thereof, with proof or written admission of service, shall be filed in the office of the clerk of the superior court. It is contended that the order of service and filing as set forth in the statute is jurisdictional, and that failure to follow it is fatal to an appeal. Reference is made to the decisions of this court with regard to filing and service of a statement of facts, the order of which is the reverse of that specified with reference to the appeal notice. It is also pointed out that this court held in *State ex rel. Alladio v. Superior Court,* 17 Wash. 54, 48 Pac. 733, that, on appeal from a justice of the peace to the superior court, it is essential, in order to confer jurisdiction, that the notice of appeal shall be filed with the justice prior to service of a copy on the adverse party.

The reasoning of the court with regard to the statement of facts was that, in contemplation of law, there can be no statement in a case until it has been first filed therein, and that no valid service can therefore be made by copy until there is an original statement. *Erickson v. Erickson,* 11 Wash. 76, 39 Pac. 241. Again, the reasoning with reference to the notice in cases of appeal from justices of the peace was that, inasmuch as twenty days are allowed for taking an appeal, it becomes necessary to first file the notice with the justice and then serve a copy, with proof that it has been so filed, for reasons stated by the court, as follows:

"Otherwise the party making such service could withhold the notice any length of time within the twenty days allowed for taking the appeal, and the adverse party would be compelled by continual inquiry to ascertain when the notice was filed with the justice, if at all, in order to know when the

ten days allowed by § 1634 for filing the transcript would commence to run. To impose this burden upon him would be contrary to the spirit of the act aforesaid, as well as against the express provisions of said § 1631, and would place such adverse party at a material disadvantage. Consequently the fact that the service preceded the filing cannot be regarded as an immaterial matter." *State ex rel. Alladio v. Superior Court, supra.*

But, whatever reasons may have led to the decisions upon the above subjects, it is nevertheless true that they did not concern the particular statute now before us, and the suggested analogy is not controlling here unless the principle involved is essentially similar. Under § 6503, *supra,* a notice of appeal becomes such by reason of its service. It is specifically stated that it is the service that effects the appeal, but if the notice and an appeal bond shall not be filed within five days thereafter, the appeal then becomes ineffectual. The only purpose the filing of the notice serves in its relation to the adverse party is that, after the short space of five days, he is thereby informed, without the necessity for further inquiry, that the appeal has become effectual in that particular. In the case at bar, the original notice bears the following indorsement, made upon it by respondents' attorneys the same day the notice was filed: "Due service of the within, after filing of original, by a true copy thereof, is hereby admitted at Spokane, Washington, this 28th day of June, A. D. 1905." It is therefore manifest that respondents knew at the time of the service that the original notice was then on file, which fact was to their advantage rather than otherwise, for the reason that no further inquiry on their part was necessary to inform them that, so far as the filing of the notice was concerned, the appeal was effected.

We think it would be a sacrifice of the plainest commonsense view, and the substitution therefor of a pure and unreasonable technical view, to hold under the above statute that the mere fact that the notice was filed by the short space

of a portion of a day before it was served was a jurisdictional defect. Particularly must this be so in view of the statute of 1899, which provides that, "No appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal, if the appellant shall forthwith, upon order of the supreme court, perfect the appeal." Laws 1899, p. 79. Respondents have been in no sense misled or prejudiced here, and no order from this court in the premises, as contemplated by the above statute, is necessary. The motion to dismiss the appeal is therefore denied.

This appeal is from an order quashing a summons and the service thereof. The essential part of the summons reads as follows:

"You and each of you are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, if served within the state of Washington, and within sixty days if served out of the state of Washington, and defend the above entitled action in the court aforesaid, and answer the complaint of the plaintiff and serve a copy of your answer on the person whose name is subscribed to this summons at Spokane, Spokane county, state of Washington, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court, a copy of which is herewith served upon you."

The summons and complaint were personally served upon respondents in the state of North Carolina. The affidavit of service is in all respects regular and sufficient. Bal. Code. § 4879, provides as follows:

"Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

It is argued by respondents, and such seems to have been the view of the superior court, that inasmuch as the summons

was so drawn that it contemplated that a service might be made either within or without the state, it is fatally defective. It is contended that the duty was upon appellant in advance to determine whether service was to be made within or without the state, and that the summons should have been drawn with reference to one or the other only. It seems to us that the essential inquiry is, Was the summons by its terms confusing or misleading to respondents? We cannot see that it was. It plainly told them that, if they were served without the state, they were required to appear within sixty days. That portion relating to service within the state became mere surplusage in view of the service that was made, and it was so manifestly such that it was in no sense confusing. We therefore think the court erred in quashing the summons and its service. Under the above statute, the service was equivalent to service by publication.

Inasmuch as jurisdiction of the persons of respondents was not acquired by the above process, the motion to quash was made upon the further alleged ground that a writ of garnishment, which had issued to reach respondents' property, was based upon a defective affidavit; thereby depriving the court of jurisdiction of the property, even under the substituted personal service without the state in lieu of publication. The motion also stated that, after the issuance of the writ of garnishment, the court made an order authorizing appellant to file an amended affidavit in aid of the writ previously issued, and averred that such order was made without jurisdiction and was void. The court denied the motion to quash upon all grounds except that the summons was defective, and allowed respondents an exception to its ruling as to the portion of the motion denied relating to the amended affidavit in garnishment. Respondents have not appealed from that part of the court's order, and the effect of the ruling therefore was that the court had acquired jurisdiction of the property, if the original summons had been sufficient.

Respondents now argue that this court should hold that the

ruling of the court upon the motion with reference to the amended affidavit in garnishment was erroneous, and that there was therefore no jurisdiction of the property. That part of the ruling is, however, not before us for review, since there is no appeal from it. The only question brought up by the appeal is that brought by appellant, and it relates alone to the sufficiency of the original summons and its service. Having determined that those were sufficient, the judgment quashing the summons and service is therefore reversed, and the cause remanded, with instructions to vacate that part of the order appealed from and proceed with the action.

MOUNT, C. J., FULLERTON, RUDKIN, ROOT, and DUNBAR, JJ., concur.

[No. 5841. Decided January 10, 1906.]

A. L. BALDWIN, *Respondent*, v. GEORGE A. DALY *et al.*, *Appellants*.[1]

BILLS AND NOTES—ONE OF MAKERS SURETY ONLY—PROOF—PAROL EVIDENCE—COMPETENCY. A co-maker of a promissory note, who signs as surety only, may show such fact by parol evidence and that the payee had knowledge thereof.

PRINCIPAL AND SURETY—RELEASE OF SURETY—CONSIDERATION—PAYMENT OF PART—SUFFICIENCY. An agreement for an immediate payment of part of a debt is sufficient consideration for the release of a surety from obligation to pay the remainder.

BILLS AND NOTES—RELEASE OF SURETY BY PAROL—STATUTE REQUIRING WRITING—CONSTRUCTION. Under Laws 1899, p. 361, providing that a "renunciation" of a negotiable instrument must be in writing, a surety thereon is not entitled to show that he had been released by parol.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 6, 1905, upon findings in favor of the plaintiff, after a trial on the merits before

[1]Reported in 83 Pac. 724.

the court without a jury, in an action upon a promissory note. Affirmed.

Reavis, Thorp & Wheeler, for appellants.

Sauter & Sheldon, for respondent.

FULLERTON, J.—This action was brought in April, 1904, by the respondent against the appellants to recover upon a promissory note for $724.95 dated February 19, 1903, and due twelve months after date. In his complaint the respondent set forth the note in words, showing its execution as principals by both of the appellants, alleged that a payment of $84.95 had been paid thereon prior to its maturity, that the balance was overdue, and demanded judgment for such balance.

The appellants answered separately. The appellant Daly answered to the effect that, prior to the maturity of the note, the respondent and appellants entered into an agreement by which the respondent, for a valuable consideration, extended the time of the payment of the note until June 1, 1904, and that the action was prematurely brought.

The appellant Peter set up the same defense, and the further defense that the respondent had released him from his obligation to pay the note. He alleged that this note, with three certain other notes, had been given as part of the purchase price of a sawmill, sold by the respondent to the appellant Daly and one Furr; that he had no interest in the purchase of the mill, but signed the same as an accommodation maker for Daly and Furr, all of which the respondent well knew; that when the first of the notes given as the purchase price of the sawmill matured it was paid by Daly and Furr, but when the second and third of the notes matured neither Daly nor Furr were able to pay the same and the respondent called upon him for payment; that he absolutely refused to pay the notes until the respondent should foreclose a chattel

mortgage given by Daly and Furr to secure their payment and obtain all he could from the sale of such property; that the matter was then taken up by all of the parties and an agreement entered into by the terms of which the respondent agreed, in consideration of the sum of $1,400_2$ which would pay the second and third notes then due in full and the interest, and $84.95 on the principal of the fourth note (the one here in suit), to give to the appellant Daly until June 1, 1904, to pay the balance owing on the fourth note, and to release the answering appellant entirely from any further liability thereon, and to look solely to the chattel mortgage and appellant Daly for payment of the same. It is then alleged that, in consideration thereof, and for the sole purpose of being released from the further payment of the note sued on, he did pay the respondent the sum of $1,400, which sum was applied by the respondent in the manner agreed upon between the parties.

A reply was filed denying the affirmative allegations of the answers. At the trial, which was had before the court without a jury, the appellant Peter offered oral evidence tending to show that he was only surety upon the note sued upon, and that he was released from his liability thereon as alleged in his answer. This evidence the court rejected, holding that oral evidence was not competent to prove either that the appellant was only surety on the note, or that he had been released from liability thereon. The trial then proceeded on the issue of extension of time, at the conclusion of which the court held the allegations not proven, and entered judgment for the respondent for the sum shown to be due on the note. This appeal is from the judgment so entered.

The ruling of the trial court, to the effect that it is incompetent for one of two or more makers of a joint and several promissory note to show by parol that he is in fact only a surety, and that he was known to be such by the payee named in the note when the note was taken, is contrary to

the ruling of this court in *Culbertson v. Wilcox,* 11 Wash. 522, 39 Pac. 954, and *Bank of British Columbia v. Jeffs,* 15 Wash. 230, 46 Pac. 247. It is apparent, however, that this question is not a material one here, unless it is to be held that the appellant Peter was entitled to show that the respondent had released him from liability on the note. On this question, the respondent suggests two considerations either of which he contends is fatal to the appellant's claim: first, that no consideration for the alleged release was pleaded; and second, that a release cannot be shown by parol. As to the first point, it was alleged that, for an immediate payment of a part of the debt, all of which was not then due, the respondent agreed to release the appellant Peter, who was only a surety, from his obligation to pay the remainder. And while it is true that courts have disagreed on the question whether the payment of a part of a debt is a sufficient consideration to support an agreement for the release of the whole, this court has taken part with the courts holding such contracts to be founded on a sufficient consideration, and we think the pleading sufficient in that respect. See, *Brown v. Kern,* 21 Wash. 211, 57 Pac. 798.

We are constrained to hold, however, that the second contention must be sustained. Section 122 of the negotiable instruments act reads as follows:

"The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon." Laws 1899, p. 361.

This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument, and if "renunciation" is used therein in the sense

of "release," there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argues that the word is used in a sense different from that of release, and that while a renunciation must be by a writing, a release may be proved by parol. But we cannot think the statute permits of this distinction. The words, "The holder may expressly renounce his rights against any party to the instrument," must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning.

The remaining question is the sufficiency of the evidence to establish an extension of time of payment of the note, but without entering into an analysis of the evidence, it is sufficient to say that we find no cause to reverse the case on this ground.

The judgment is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5886. Decided January 13, 1906.]

R. F. PARKHURST, *Respondent*, v. WILLIAM R. DICKINSON *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—ATTEMPTED RESCISSION BY VENDEE—DEFECT IN TITLE—FAILURE TO TENDER RECONVEYANCE—LIABILITY TO ASSIGNEE OF VENDOR FOR BALANCE OF PURCHASE PRICE. Where a conveyance of land was made subject to approval of the title by the vendee, in consideration of $500 in cash, $500 to be paid on approving the title, and the balance by the discharge of a debt due from the vendor to the vendee, and pending the approval of the title the vendor assigns the contract for the $500 still due, to a third person, the vendee cannot, on finding the title defective, rescind the contract without tendering a reconveyance; and where rescission was attempted but found impracticable because of the vendor's inability to return the

[1]Reported in 83 Pac. 895.

money paid, and the vendee sold the land in an attempt to reimburse himself for the money paid and the previous indebtedness, he affirms the contract, and is liable to the assignee thereof for the balance due on the purchase price (ROOT, J., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 2, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

George E. de Steiguer, for appellants.

Jerold Landon Finch (Wilson & Thorgrimson, of counsel), for respondent.

FULLERTON, J.—On and prior to October 11, 1901, one Wakefield was indebted to the appellant William R. Dickinson in the sum of $1,000, for money which he had received as the agent of Dickinson. At that time he held for sale certain real property, which stood in the name of one Florence Ready. Wakefield proffered this property to Dickinson for a consideration of three thousand dollars, one thousand to be paid by the assumption of a mortgage on the property for that amount, one thousand by the cancellation of the debt from Wakefield to him, and one thousand dollars in cash payable to Wakefield. Dickinson agreed to take the property provided the title proved satisfactory. Wakefield caused the property to be conveyed to Dickinson, who paid him at that time five hundred dollars and gave him a writing of which the following is a copy:

"I have this day received from you deed of conveyance of the following described premises situated in King county, state of Washington, and particularly described as follows, to wit: Lot six (6) in block three (3) of Bigelow's Addition to the City of Seattle, according to the recorded plat thereof; and paid to you the sum of five hundred dollars ($500) upon the purchase price thereof, such purchase price to be in all one thousand dollars ($1,000). Upon the ap-

proval of the title to said premises by my attorney and upon my being satisfied that there are no unpaid claims for labor or material furnished in the improvement of said premises, then I am to pay you the balance of the purchase price, to wit: the sum of five hundred ($500) dollars."

Thereafter an abstract of the title to the property was handed Dickinson's attorney for examination, and was pronounced by him to be defective. Dickinson thereupon sought to rescind, but as Wakefield was unable to repay the money advanced, this was found to be impossible. After much negotiation the parties settled the matter in this manner: Dickinson made a deed to the property to Florence Ready, and placed it in escrow, with instructions to deliver it to Wakefield on payment of the five hundred dollars advanced on the purchase price of the property at the time the contract of purchase was entered into, and the one thousand dollars Wakefield was then owing him. In the meantime, Wakefield had assigned the writing above quoted for value, and in due course it came into the possession of the respondent, who brought this action to recover upon it.

The foregoing is in brief the salient facts of the case, and on them the trial court held the respondent entitled to recover. It seems to us that this conclusion is just. After Wakefield had parted with his title to the writing he could make no contract with Dickinson that would affect the holder of that instrument. Nor did it become nugatory from the mere fact that Dickinson's attorney pronounced the title defective. Doubtless this fact gave Dickinson the right to rescind the contract, and to recover from Wakefield the money advanced him on account of the purchase price. To do this he was required to reconvey the property to his grantor and tender the deed to Wakefield. But he chose to keep the property, and subsequently disposed of it so as to recover, not only the five hundred dollars advanced as part of its purchase price, but the one thousand dollars Wakefield owed him. This was an affirmance of the contract of sale, not a rescission,

and the appellants thereupon became obligated to pay the money according to the promise contained in the writing.

Affirmed.

MOUNT, C. J., HADLEY, and DUNBAR, JJ., concur.

ROOT, J., dissents.

[No. 5853. Decided January 13, 1906.]

ALFRED LEESON, *Respondent*, v. SAW-MILL PHOENIX *et al.*, *Appellants*.[1]

MASTER AND SERVANT—NEGLIGENCE—INJURY TO SERVANT FROM DEFECTIVE LATHE — ASSUMPTION OF RISKS — PROMISE TO REPAIR — LIABILITY OF MASTER. An operator of a turning lathe is, by the master's promise to repair, relieved from the assumption of risks by reason of a broken socket, where it appears that the superintendent told him to take the socket to the office and it would be repaired, which he did several times, but returned with it and used it unrepaired upon an urgent request of the foreman, upon his promise to repair it as soon as the job was completed, and where the danger was not so imminent that a workman of ordinary prudence would have regarded it so hazardous as to have refused.

DAMAGES—FOR PERSONAL INJURIES—EXCESSIVE VERDICT—REMISSION. A verdict of $5,500 for personal injuries sustained by an operator of a turning lathe, a married man forty-seven years of age, and capable of earning $3,50 per day, is excessive, and should reduced to $3,500, where the only result of the accident was hernia, and testimony of the experts was to the effect that a great majority of people afflicted with this disorder are able to carry on their regular occupations with the aid of trusses, and that a large per cent of such cases are permanently cured by an operation, and where the plaintiff was otherwise in normal health and testified that he had since the injury done some light work.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered February 27, 1905, upon the verdict of a jury rendered in favor of the plaintiff for $5,500, for personal injuries sustained by a turner through a defective lathe. Affirmed on condition of the remission of $2,000.

[1]Reported in 83 Pac. 891.

R. J. Danson and *Post, Avery & Higgins,* for appellants.
Graves & Graves and *B. H. Kizer,* for respondent.

ROOT, J.—Respondent instituted this action to recover damages for an injury sustained while operating a lathe, in the wood turning department of a mill owned by the defendant mill company. The facts were about as follows: There was, in said department, a small lathe capable of turning a stick about four feet in length, and a large lathe to be used upon sticks much longer. The accident occurred while the respondent was operating the latter. Respondent, Alfred Leeson, was the wood turner for appellant. Defendant William R. Roy was the superintendent in charge of the mill at the time of the accident; and appellant John Peterson was the foreman. The accident was alleged to have been caused by the use of a broken socket which holds the rest which steadies the chisel held by the operator in turning a stick.

There are two of these sockets, somewhat in the shape of the letter "L." The longer side of the socket rests on the timbers forming the table, and is fastened down solid by a bolt, the head of which catches in a groove extending down the middle of this brace or socket, and is held down by a crosspiece under the timbers of the table. Extending from the upright arm of one of these braces or sockets to the other is a parallel bar forming the rest. By reason of the groove in the brace the distance of the rest from the timber in the lathe can be regulated according to the size of the piece being turned, but when it is set it is perfectly solid. The timber to be turned, a square piece of wood, being fixed in the lathe, power is applied and the clamps and the stick they hold are made to revolve with great rapidity toward the rest.

The turner takes a position in front of the rest, holding a chisel or gouge, which, with its handle, is about two feet long, in a slanting position and resting upon the rest. The blade is turned upward and toward the revolving timber, so that as it comes in contact with the chisel the corners are cut off

and the timber is made round, beaded, fluted, or otherwise shaped as the operator desires. The handle projects below the rest, and is grasped there by both hands of the turner. The rest is necessary to this work, and must be perfectly solid, since if it were loose or wobbly the chisel could not be held firmly, and might catch in the revolving timber, with probable injury to the person holding it.

At the time of the accident, one of the sockets or braces was defective in that a piece had been broken out of one side of the arm resting on the table next to the groove, so that the head of the bolt would not catch and hold the brace. This brace or socket had been broken for some time; but respondent continued to use it without complaint until the day of the accident, or as he maintains, two or three days before the accident, when he called both Mr. Roy's and Mr. Peterson's attention to it. During this time he fastened the socket down by some sort of a wooden contrivance arranged by himself. When he called Mr. Roy's attention to it, Mr. Roy told him to take the socket to the office, and he would have it fixed. This Leeson did in a few minutes, but later on in the morning he brought it back and used it on another job.

When the superintendent went to the office to get the rest to have it fixed, that same morning, he found it gone, although he had seen it there a little while before. Respondent claims to have returned it and again taken it after having been told by Peterson that he must get out a certain order at once, which he could only do on the large lathe. Peterson swears that he did not tell Leeson to get the rest to do the work, and he did not promise to have it repaired. Leeson proceeded to use the broken socket, although he believed there was some danger in so doing. It was while Leeson was using the lathe, after having brought back the socket the second time, that the accident is alleged to have occurred. It is claimed that by reason of the rest being loose, the handle of the chisel was thrown back, hitting appellant in the abdomen and rupturing him. It was about noon at the time, and appellant sat down

and did not begin work until after dinner. He finished the rest of the five timbers which he had begun to turn that day, and continued working for three or four days before he went to see a doctor. He did not complain of being hurt to Mr. Roy till a day or two after the accident. He continued to work at the mill for a few days after he had seen the doctor. Plaintiff is an expert wood turner, a married man forty-seven years old, and was earning $3.50 per day. The answer, by way of affirmative defense, alleges that whatever injury said plaintiff sustained, was caused by his own negligent act; and that he, by his own negligence, contribued to and caused said injury; and that said plaintiff knew any and all danger which he would and did incur in performing said labor, and voluntarily assumed any and all risk in performing said work.

A trial was had before a jury, which brought in a verdict of $5,500 for the plaintiff. Challenges to the sufficiency of the evidence and motions for judgment were made by appellants, at the close of respondent's case, and at the end of all the evidence, all of which were overruled except as to Roy. A motion for a new trial was duly made, and denied. The court having sustained a motion for a nonsuit as to the defendant William R. Roy, judgment of dismissal was entered as to him. Judgment was entered against defendants Saw-Mill Phoenix and John Peterson, for $5,500, together with cost incurred. From this judgment, said defendants appeal to this court.

Appellants assign error upon the action of the court in giving certain instructions, and in refusing to give others requested by them. Some of the instructions complained of were faulty or defective; but we do not believe the giving of any of them was, or was capable of being, prejudicial to appellants. Some of those requested by appellants were correct statements of law, but inapplicable to this case. Others referred to matters properly covered by the instructions given by the court. We think that the charge given fairly covered

the case and that no reversible error was committed either in the giving or refusing of instructions.

Error is assigned upon the denial of the motions made for judgment at the close of respondent's case and at the termination of all the evidence. There is no doubt but that respondent would be held to have assumed the risk of the danger that occasioned his injury, were it not that he was working, as he maintains, under a promise to repair. In fact, respondent's counsel do not claim otherwise. The pivotal question is as to whether or not respondent was working under a promise to repair such as would take the case out of the ordinary rule of assumed risk. We think that he was. The superintendent promised to have the socket repaired or replaced by a new one as soon as respondent finished the job he was then working on. But before this repairing was done, another piece of work was presented. The foreman told him that it must be done immediately. It was necessary, or at least respondent believed it was necessary, to use the large lathe and the broken socket to perform this work. Respondent testified that the foreman told him to get and use this socket, and it would be repaired when the job was completed, and he did so very reluctantly. His evidence on this point, however, is somewhat confused and not very satisfactory. We think, however, that from all of the evidence the jury could legally have found that both the foreman and superintendent promised to repair or replace this defective appliance, and that respondent continued to work with the same, expecting that it would soon be repaired or replaced.

It is urged, however, by appellants that the promise does not bring the case within the exception to the rule for the reason that they did not promise to make the repairs or change until a definite time thereafter—to wit until the job was finished that respondent was working upon, and hence that the promise was not effective as to the piece of work he was then engaged upon. We cannot uphold this contention. Neither of the jobs mentioned required much time—one but

a few hours, the other about one day. Believing that the socket would be repaired or replaced within a few days, he was justified in trying to work with the broken appliance unless the danger from it was so imminent that a workman of ordinary prudence would have regarded it too hazardous and have refused, for that reason, to so use it. He admits that he knew there was some danger to be apprehended, but did not regard injury therefrom as probable. We cannot say, as a matter of law, that the danger was so apparent and imminent that he should have declined to use the broken socket notwithstanding the promise to repair or replace. Ordinarily intelligent, reasonable, fairminded men might properly differ upon this proposition; hence, it was a question for the jury. That body having found the issue in favor of respondent and the trial court having upheld the verdict, we feel bound thereby.

Appellants insist that the verdict is excessive. We think the contention must be sustained. Respondent placed upon the witness stand two physicians. One of these was Dr. Baker, who, among other things, stated as follows:

"I think as a rule the majority of men with ruptures are fairly comfortable with a truss, others again are not comfortable. . . . I don't know about the percentage but I think the majority are able to engage in physical exercise and carry on some light occupation."

And upon cross-examination, testified: "As applied to the risk to live, if the rupture is constantly kept within the abdominal walls by a truss, there is practically little danger of any serious complication as far as life is concerned."

The other was Dr. Catterson, who upon direct examination was asked the following question, and answered as indicated:

"Q. About what probability of recovery would there be? Are you able to state it any more definitely than you have? A. Oh, I should judge that at least 75 per cent of these cases are permanently cured. Many of them are cured for the time being but in a year or two the rupture returns again;

the tissue gives way and they have the same condition back again."

And upon cross-examination, answered questions as follows:

"Q. About what length of times does it take a patient to recover from an operation of this kind? A. Oh, a patient usually gets up in two weeks or three weeks; but it is usually necessary for them to keep pretty quiet for six weeks or two months before they are able to be around very much or to do work. Q. And after that if there is a recovery, they are substantially in a normal condition, are they not? A. Yes, a very good condition. . . . Q. And I will ask you if, in your judgment, an operation could be successfully performed upon him? A. I think so. . . . Q. I will ask you if, in your judgment, you could not take this man and perform an operation upon him, and make him practically in normal condition, in your judgment? A. Yes, so far as I can see; I see no reason why it could not be done. . . . Q. Isn't it a fact as shown by the medical authorities, that one-sixth of the population are suffering with rupture? A. Yes, I think that is correct. . . . Q. Doctor, this operation, assuming that it was all successful, and so on, what would it cost for nurses, medicines, doctors and hospital fees and so on? A. Oh, somewhere in the neighborhood of two or three hundred dollars; between two and three hundred dollars maybe."

The appellants placed upon the witness stand one Dr. Essig. At the close of this doctor's testimony the counsel for respondent admitted in open court that another medical expert whom the appellants were intending to call as a witness would, if called, testify in substance the same as Dr. Essig. And said counsel for respondent also in open court made the following statement: "I am willing to take Dr. Essig's testimony as correct. I think he exaggerated a little, but I am willing to take his testimony as stating the medical facts in the case if it will save you any time." Dr. Essig, among other things, testified as follows:

"He has a rupture of the right side, what we call an inguinal hernia; that is a hernia that passes through a ring,

what we call the internal ring, . . . Q. Now, I will ask you to state what he can use, if anything, for the purpose of enabling him to work? A. He can wear a truss, or he can have an operation performed upon it to make a permanent cure. The truss, of course, is something that supports and prevents it from coming into the canal at all. Q. What was his general physical condition? A. Good. After the examination, I asked him if there was anything else. He said absolutely nothing excepting that. Q. What was his appearance as to being in normal condition in flesh and all? A. He appears to be in a healthy condition, aside from the condition of the rings. Q. I will ask you state to the jury, from the examination which you made and from your talk with him, whether in your judgment he can wear a truss and would then be able to work and perform the ordinary occupation which he follows of a turner? A. I discovered no reason why he might not do it; none whatever. Q. I will ask you what percentage of people the medical authorities show to be suffering with rupture? A. In perhaps about 16⅔ per cent of the people that you meet upon the street where there is no family history of hernia preceding—I mean in the ancestry—have hernias, or about 22½ per cent of people whose ancestors have had hernia have it; about 16⅔ per cent of those who give no ancestral history have it. In other words, about 16⅔ per cent of the people that you meet in common every day life are afflicted with hernia. . . . Q. I will ask you to state to the jury whether or not in your opinion as a surgeon, a skillful surgeon could perform a successful operation upon this plaintiff and cure him of this rupture, make him fully cured? A. I discovered no reason whatever to indicate otherwise. Q. About how long a time would it take from the time of the operation? A. I make it a rule in my own cases to keep them in bed about three weeks after an operation. I keep them longer after hernia operations than others because you are trying to close a natural canal in it and you want to be sure that your adhesions are all perfect; so I usually keep them three weeks. A great many keep them about two weeks. Foley, who does more operations than any man in the United States, and possibly than any man living, keeps them two weeks. Q. About how long would it take him to recover if the operation was successful? A. Well, full recovery is a question that has to be determined

by the lapse of some time. We occasionally have a relapse after an operation. If the patient gets on without relapse, without a recurrence of it for a year, without getting down again, we consider that the cure is permanent. But inside of six weeks a case without any complication arising in it, ought to be able to resume work. Q. And perform any ordinary labor, such as turning? A. Yes, any labor that he might ever have performed previously. Q. Now, then, I will ask you, in your judgment, without this operating, with the use of a truss, if this man can perform the usual avocation of a turner? A. Any properly fitted truss ought to enable that man to perform any labor that he has ever performed heretofore. . . . The probabilities are that there has always been that weak condition upon both sides, because it shows itself at this side of the ring, a feebly closed right. . . . Q. I mean if he has got a truss on it don't hurt him? A. Not necessarily, no, sir; because thousands wear them and work hard every day. Thousands have them and work without feeling them. . . . A. I wouldn't charge him less than $250. Q. What other expenses would he have? A. His hospital expenses. Q. How much would they be? A. Three weeks. . . . That would cost him anywhere from $8 a week up to $15, $18, $20, $25 or $30 depending on the kind of room he thought he ought to have. He would rest as well in the $8 bed as he would in the $30 bed. . . . A. Well, sir, the average death rate in 10,000 up to 1900 is nine-tenths of 1 per cent and it has improved a little recently. . . . Q. There is, however, a risk attending the operation? A. There is no operation that is free from risk. . . . Q. All that you can say, or the most skillful of you, is that the probabilities are that a cure will be effected and a recovery had? A. Yes, that is all any man can say."

All of the doctors testified that respondent was in a healthy normal condition with the exception of the hernia. Respondent, himself, testified that since quitting work in the mill he had engaged a small part of the time in some occupations not requiring much physical exertion. The evidence given by the medical witnesses and by respondent, and in his behalf, does not in our opinion show an injury justifying an award of damages in the sum found by the jury. We believe that

the sum of $3,500 would be very ample compensation, and much more in accord with what is right in the premises. An excessive verdict in a case like this is not only an injustice to the defendants, but it is a menace to the welfare of the state, and should not be upheld.

The case will be remanded with the following instructions: If respondent, within thirty days from the filing of the remittitur in the superior court, shall file a relinquishment of so much of the judgment as exceeds the sum of thirty-five hundred dollars, the judgment in said sum will stand affirmed. If such relinquishment is not so filed within said time, the superior court is directed to enter an order granting a new trial. Costs to appellant.

MOUNT, C. J., CROW, and HADLEY, JJ., concur.

FULLERTON and RUDKIN, JJ., concur in the result.

[No. 5884. Decided January 15, 1906.]

P. H. POSTEL, JUNIOR, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIM—DAMAGES FROM GRADING STREET—NECESSITY—CHARTER—CONSTRUCTION. Art. 4, Sec. 29, of the charter of Seattle requiring all claims for damages to be filed with the city clerk within thirty days, applies to claims for damages to lots by reason of a change of grade, although the section provides that all such claims must "locate and describe the defect that caused the injury" (RUDKIN, J., dissenting).

SAME—TIME FOR FILING—REASONABLENESS. Art. 4, Sec. 29, of the charter of Seattle requiring all claims for damages to be filed with the city clerk within thirty days, is not void as fixing an unreasonable time within which to file claims (RUDKIN, J., dissenting).

Appeal from a judgment of the superior court for King county, Joiner, J., entered July 1, 1905, upon sustaining a demurrer to the complaint, dismissing an action for damage to lots by reason of a change of grade. Affirmed.

[1]Reported in 83 Pac. 1025.

cBride, Stratton & Dalton, for appellant.
cott Calhoun and *O. B. Thorgrimson,* for respondent.

ULLERTON, J.—The appellant is the owner of certain lots he city of Seattle fronting on Republican street and First nue North. On February 4, 1903, the city of Seattle ed an ordinance providing for the grading of the streets e named, and pursuant thereto the city caused the same e graded, completing the work on October 3, 1904. The le as planned called for deep cuts in front of the appel-'s property, and when completed his lots were left from en to thirty feet above the surface of the streets, cutting access to them except from the rear through a narrow y over a steep grade. On March 16, 1905, the appellant ented to the city council of the city of Seattle, and filed the city clerk, a claim for damages caused by the grade, ch claim the city rejected. This action was thereupon ght to recover for the injury caused the lots by the grade. a complaint embodying the foregoing facts, the city de-red on the ground that it did not state facts sufficient onstitute a cause of action. The court sustained the de-rer, whereupon the appellant elected to stand on his com-nt. Judgment of dismissal was thereupon entered, and appeal was taken therefrom.

ection 29 of art. 4 of the charter of the city of Seattle ls as follows:

SECTION 29. All claims for damages against the city t be presented to the city council and filed with the clerk in thirty days after the time when such claims for dam-accrued, and no ordinance shall be passed allowing any claim or any part thereof, or appropriating money or r property to pay or satisfy the same or any part thereof, l such claim has first been referred to the proper depart-t, nor until such department has made its report to the council thereon, pursuant to such reference. All such ns for damages much accurately locate and describe the

defect that caused the injury, accurately describe the i
give the residence for one year last past of the cla
contain the items of damages claimed, and be sworn
the claimant. No action shall be maintained against t
for any claim for damages until same has been pre
to the city council and sixty days have elapsed afte
presentation."

The trial court held that this section of the city's c
requires claims for damages of all kinds against the
be presented to the city council and filed with the city
within thirty days after the time when such claim a
before an action can be commenced thereon; and sin
appellant did not file his claim until some five month
its accrual, it was barred by this provision of the c
Against this ruling, the appellant makes two conte
first, that this provision does not apply to this chara
claim; and second, if it does so apply, it is void bec
reasonable time within which to present such claims
allowed by it.

With regard to the first question, we think there
but little doubt that the charter provision requires cla
this character to be presented to the city council an
with the clerk. The language used is "all claims fo
ages," and this admits of no exception. True, other p
of the section would seem to be more appropriate to
of another character than this, but this cannot be held
away with the general requirement. In presenting
the details provided by the charter provision need o
followed in so far as they are applicable to the par
claim, but the general provision requiring claims fo
ages to be presented is applicable to all claims, and
followed in every instance. A similar question was
this court in *Scurry v. Seattle*, 8 Wash. 278, 36 Pa
The charter of the city of Seattle at that time requi
claims for damages to be presented to the city council
six months after the time when such claim accrued, a

held that a claim for damages sustained by the grading of a street must be presented within the time required as a condition precedent to the maintenance of an action thereon.

Nor do we think the second objection is well taken. In *Born v. Spokane,* 27 Wash. 719, 68 Pac. 386, and *Ehrhardt v. Seattle,* 40 Wash. 221, 82 Pac. 296, we held that thirty days was a reasonable time within which to present a claim for personal injuries, and it would be difficult to make a distinction in this regard between claims of that character and claims of the character of the one at bar. We are therefore constrained to hold the requirement reasonable in this respect.

The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, DUNBAR, and HADLEY, JJ., concur.

RUDKIN, J. (dissenting)—I dissent. A literal construction of the first part of the charter provision quoted in the majority opinion would require that all claims against the city should be presented within 30 days after the cause of action accrued. A claim arising out of contract as well as out of tort is "for damages." I think the latter part of the provision shows that the entire provision was only intended to apply to claims for damages arising from defects in the streets or other places which the city is obligated to keep in repair. Any other construction in my opinion renders the charter provision unreasonable and unconstitutional.

[No. 5719. Decided January 15, 1906.]

WILLIAM SIDEBOTHAM, *Respondent,* v. MERCHANTS FIRE ASSOCIATION, *Appellant.*[1]

INSURANCE—LOSS BY FIRE—PROOFS OF LOSS—WAIVER—EVIDENCE—SUFFICIENCY. A fire insurance company waives sworn proofs of loss called for by the policy, where immediately after the fire the insured notified the officers of the company of the loss and inquired what was necessary to be done in order to have the loss adjusted, and followed out instructions given to secure invoices, and subsequently the company refused to pay anything on the loss without giving any reason therefor; since there was an evident intent to mislead the insured by the giving of incorrect instructions.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 6, 1904, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action on a fire insurance policy. Affirmed.

Leopold M. Stern and *H. T. Granger,* for appellant.

Andrew J. Balliet, for respondent.

FULLERTON, J.—The appellant is a mutual fire insurance company, organized under the laws of this state. On March 11, 1903, it issued its policy of insurance to the appellant covering a certain stock of merchandise, and certain furniture and fixtures owned by him, insuring him in a sum not exceeding $800, against loss by fire, for a term of one year from and after that date. The property was destroyed by fire within the term covered by the policy, and on the refusal of the company to pay the amount of the loss, this action was brought to recover the same. In his complaint the respondent alleged that he had complied with all the conditions of the policy save that requiring him to furnish sworn proofs of loss, and that the company had waived this requirement by

[1]Reported in 83 Pac. 1028.

denying any liability under the policy and refusing to pay in any event. Issue was taken on the allegations of the complaint, and a trial had, which resulted in a verdict and judgment for the respondent. The insurance company appeals.

The single question raised and discussed by counsel for appellant is the sufficiency of the evidence to justify the finding of the jury that the appellant had waived the provision of the policy requiring the respondent to make sworn proofs of loss. On this question, while it was somewhat meager, we think there was not a total want of substantial evidence. It was shown that, on the day after the fire occurred, the respondent called in person at the insurance company's office, and notified its officers of the fire, and his losses thereunder, giving them at the same time all the information he possessed as to the origin of the fire; in fact, he was subjected to a long cross-examination by the officer of the company in charge concerning all of these matters.

At the conclusion of the interview, the appellant inquired of the officer what was necessary to be done in order to have his loss adjusted, and was informed that he would be required to furnish invoices from all of the wholesale dealers with whom he had dealt, showing the amount of goods purchased by him while in business, and submit for examination such of his books as would show the amount of goods disposed of during the same period. The interview then ended, and the respondent after some time procured the invoices required and submitted them with his books to the insurance company for examination. Later on a representative of the company was sent out to investigate the cause of the fire. Following this there were a number of interviews between the respondent and the company's officer, during which the matters were again gone over. Finally the respondent inquired directly what the company proposed to do about adjusting and settling the loss, and was told, "Nothing at all." Inquiring why, he was answered that he had not complied

with his contract. Inquiring in what particular he had failed, he was told that it was not the business of the company to inform him.

Finally, just before the time expired in which he was required to furnish proofs of loss, he called again at the insurance office, and finding no representative of the company in, left a note saying that if the matter was not forthwith settled he would institute suit on the policy. On the next day he received in reply to this a letter from the company in the following words: "If you intend or desire to make any claim for loss against the company, the manner of proceeding and presenting said claim are plainly printed in your contract, and we respectfully refer you to them." This ended the negotiations between the parties, and soon thereafter this action was brought. The company then, for the first time, made known to the respondent the precise ground on which it rested its claim of nonliability.

The foregoing, while but a brief outline of the testimony, shows conclusively that the respondent was misled by the acts of the company's officer into the belief that he had done all that the company required of him in the way of furnishing proofs of loss. And what is more to the point, it shows that the company's officer knew he was being deceived in that respect. The company, therefore, owed him the duty of informing him directly in what manner he had failed to comply with his contract, and failing in that, it must be held to have waived the requirement. It is argued, however, that the appellant did not owe the respondent the duty of informing him how to proceed under his policy in order to make a valid claim of loss. This would be true, undoubtedly, had the appellant dealt with the respondent at arms length from the start, but it did not do this. It undertook to inform him what it was necessary to do in order to have his loss adjusted, and having undertaken to so inform him, it owed him the duty of informing him correctly. But it is said that the

letter above quoted did inform him in what particular the company claimed that he had not complied with his contract. But plainly this is not so. Its want of frankness would be apparent did we not know what had preceded it, but in the light of that, it looks like an intentional effort to deceive.

The judgment is right, and should be affirmed. It is so ordered.

MOUNT, C. J., ROOT, CROW, DUNBAR, HADLEY, and RUDKIN, JJ., concur.

[No. 6042. Decided January 15, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Tony F. Richardson, Plaintiff,* v. THE SUPERIOR COURT FOR DOUGLAS COUNTY, *Respondent.*[1]

MANDAMUS—PARTIES—PROSECUTION IN NAME OF STATE. An application for a writ of mandate in the interest of a private party is properly made in the name of the state.

APPEAL—RECORD—STATEMENT OF FACTS—CONTENTS—FAILURE OF COMMISSIONERS TO RETURN EVIDENCE—SUBSEQUENT FILING AND CONSIDERATION—WHEN NOT PART OF RECORD. Where the testimony taken before commissioners is not returned with their report, but is afterwards transcribed and filed in the cause by one of the parties, and thereafter considered by the parties and the court in considering the report, it is not a part of the record within the purview of Bal. Code, § 5064, so providing as to testimony returned into court by the commissioners with their report; hence it must be made a part of the statement of facts in order to be considered on appeal.

SAME—MANDAMUS—COMPELLING CERTIFICATION OF STATEMENT OF FACTS—WHEN LIES. Evidence taken before commissioners not returned by them, but subsequently transcribed and considered by the court, without objection, is proper for the consideration of the supreme court on appeal, and the lower court will be compelled by mandate to embody the same in the statement of facts, where he has refused so to do; and the fact that he had already certified to a statement not embodying the same is no defense to the application.

[1]Reported in 83 Pac. 1027.

Application filed in the supreme court January 6, 1906, for a writ of mandate to the superior court for Douglas county, Steiner, J., to compel the settlement and certification of a statement of facts. Granted.

Merritt & Merritt, for relator.

RUDKIN, J.—The case of *Richardson v. Richardson* was before this court on a former appeal, and will be found reported in 36 Wash. 272, 78 Pac. 920. The judgment was there affirmed in part, but reversed as to the disposition made of the property rights of the parties. The case was remanded, with directions to take further testimony in such manner as the court might determine, and make an equal division of the property between the plaintiff and the defendant, in kind or otherwise. After the cause was remanded, the court appointed three commissioners,

"with the full and same power in relation to the matters, and subject to the limitations and directions prescribed and set out in this order of reference, as is possessed by this court, to conduct trial; to examine witnesses; to grant adjournments; to administer oaths; preserve order; to compel the attendance of witnesses; and to punish them for nonattendance or refusal to be sworn or to testify, for the purpose of taking testimony, and examining and ascertaining, setting out, recommending and reporting to this court the facts and findings."

Here follows a statement of the matters to be embodied in the report of the commissioners. It was further ordered

"that, upon the completion of its duties herein, or upon the order of this court, said commission shall make a full and written report of all its doings in this behalf, and of all schedules and inventories, findings, facts and recommendations to this court."

The commissioners examined witnesses, heard testimony, inspected the property, and made a report and a supplemental report to the court. No testimony or other evidence was re-

turned into court with either report, and no reference to the testimony or other evidence was made in either report, further than that the commissioners had examined witnesses and taken testimony. In fact, at the time these reports were filed, there was no record of the testimony taken before the commissioners, aside from the shorthand notes of the reporter.

After the filing of these reports, the attorneys representing the plaintiff in the court below, the relator here, caused the notes of the testimony taken before the commissioners to be extended, and filed a copy thereof with the clerk of the court at the hearing on the report of the commissioners. The testimony so filed was considered by the court and all parties concerned as the testimony taken before the commissioners, but the same was not reported by the commissioners nor authenticated in any way. The court confirmed the report of the commissioners, and rendered judgment in accordance with their recommendations. The plaintiff has prosecuted an appeal from the judgment so rendered. Afterwards, and within the time required by law, the plaintiff filed a proposed statement of facts, which embodied the testimony taken before the commissioners, and filed as aforesaid. The defendant filed proposed amendments, consisting of the order of reference, the report of the commissioners, and other matters not necessary to be considered here.

The matter of settling and certifying the statement of facts came on regularly to be heard, and so far as the record before us discloses, the defendant made no objection to the statement as proposed by the plaintiff, and the plaintiff made no objection to the amendments as proposed by the defendant, but the court, of its own motion, refused to embody the testimony above referred to in the statement of facts, for the reason that the same was already a part of the record. On the foregoing facts, which are admitted by the demurrer of the respondent, the plaintiff has applied to this court for a writ of mandate requiring the trial judge to embody said testi-

mony in the statement of facts, and certify the same as required by law.

The defendant in the court below has made no appearance in this court, but the trial judge has filed a demurrer to the application on the following grounds: (1) Because the plaintiff has no legal capacity to sue; and (2) because the application for the writ does not state facts sufficient to constitute a cause of action. The first ground of demurrer was decided adversely to the respondent in *State ex rel. Weinberg v. Pacific Brewing etc. Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208. It was there held that an application for a writ of mandate in the interest of a private party was properly instituted in the name of the state.

Bal. Code, § 5064, provides that,

"All reports of referees or commissioners, with the testimony and other evidence returned into court therewith . . . shall be deemed and are hereby declared to become, upon being filed in the cause, . . . a part of the record in the cause, for all the purposes thereof and of an appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts."

If the testimony referred to falls within the purview of the above statute, the writ should be denied; but in our opinion it does not. It was not reported by the commissioners, nor was it in any manner identified or referred to in their report, or in the final judgment of the court. It manifestly did not become a part of the record for the purpose of an appeal or for any purpose by being filed in the cause by one of the parties to the action. Until this testimony was adopted by the court and the parties at the hearing on the report of the commissioners, it formed no part of the record and had no connection with the case. If, instead of consenting to the consideration of this testimony, the defendant had moved to strike it from the files, the court would have no alternative but to grant the motion. Perhaps the better practice would

have been to require the commissioners to return the testimony taken before them with their report, so that the same might become part of the record. But that question of practice does not concern this court, nor did it concern the court below.

It is admitted that the testimony in question was considered by the trial court on the hearing of the application for a judgment on the report of the commissioners, and it is therefore proper for the consideration of this court on appeal. We are of opinion that such testimony was not returned by the commissioners, within the purview of the statute in question, and formed no part of their report; that it first became evidence in the case when adopted by the court and the parties at the hearing of the application for judgment, and that it formed no part of the record unless made so by bill of exceptions or statement of facts. The fact that the trial judge has already certified a statement of facts which does not embody the above testimony, is no defense to this application. Bal. Code, § 6060, provides as follows:

"And if the judge refuse to settle or certify a bill of exceptions or statement of facts or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto."

Let the writ issue as prayed, commanding the respondent to settle and certify a statement of facts embodying all testimony considered in the trial court on the application for judgment on the report of the commissioners, and such other matters as are required by law.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

[No. 5935. Decided January 15, 1906.]

ROSE HARRIS, *Respondent,* v. THE TOWN OF MT. VERNON, *Appellant.*[1]

MUNICIPAL CORPORATIONS — NEGLIGENCE — DEFECTIVE SIDEWALK — NOTICE—EVIDENCE—SUFFICIENCY. A finding of negligence on the part of a city as to a sidewalk, is sustained where there was evidence to the effect that the walk had long been out of repair, that the particular defect had existed more than a month, and had been called to the attention of the city officers and council prior to the accident.

SAME—EVIDENCE—CONDITION IN VICINITY—ADMISSIBILITY. In an action for injuries sustained through a defect in a sidewalk it is competent to prove the general condition of the walk for a reasonable distance on each side of the defect in question.

SAME—INSTRUCTIONS—GENERAL CONDITION IN VICINITY OF ACCIDENT. In an action for injuries sustained through a defect in a walk, it is proper to instruct that the jury may consider the general condition of the sidewalk in the immediate vicinity.

DAMAGES—FOR PERSONAL INJURIES—CAUSE OF PHYSICAL CONDITION—EVIDENCE—QUESTION FOR JURY. A verdict for $2,500 damages for a fall upon a sidewalk is not shown to be excessive where there was an issue as to whether the accident resulted in curvature of the spine, or whether that was caused by plaintiff's physical condition; and the question is for the jury, where the only expert testified that it could have been caused by the accident, and there was testimony to the effect that prior thereto the plaintiff was a strong healthy woman with no symptoms of any ailments that developed immediately thereafter.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 8, 1905, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained through a fall on a defective sidewalk. Affirmed.

Dave Hammack (Million & Houser and *Shrauger & Barker,* of counsel), for appellant.

McLean & Wakefield, for respondent.

FULLERTON, J. — The respondent recovered a judgment against the appellant town in the sum of $2,500, for injuries

[1]Reported in 83 Pac. 1023.

received from a fall caused by a defective sidewalk constructed and maintained by the town on one of its streets. The town has appealed from the judgment, and as grounds for reversal assigns that the court erred, first, in refusing to grant the appellant's motion to take the case from the jury and enter judgment for the appellant, made at the close of the respondent's case in chief; second, in refusing to hold that the evidence was insufficient to justify the verdict; third, in the admission of certain evidence; fourth, in its instructions to the jury; and fifth, in refusing to hold that the verdict was excessive, and given under the influence of passion and prejudice.

The first two assignments suggest the same question, namely, the sufficiency of the evidence to justify the verdict. On this branch of the case it is argued that the evidence showed that the sidewalk at the place of the accident, and generally in its vicintiy, was in reasonably good repair, and that the city had no notice, either actual or constructive, of the particular defect that caused the accident. The evidence on the part of the city, it is true, tended to this effect, and the jury doubtless would have been warranted in so finding. But there was substantial evidence the other way. It was testified by competent and disinterested witnesses, living within the vicinity of the walk, that the walk had long been out of repair—so much so, in fact, that one walking over it had to use more than ordinary care to avoid injury; and that the particular board that caused this injury was warped and loose, so that it would rock when stepped upon, and that it had been in that condition for more than a month prior to the accident. It was testified, also, that the attention of certain officers of the city had been called to the defective condition of the walk, and that it had been the subject of consideration by the city council prior to the accident. This, if believed by the jury, abundantly justifies their verdict. True, much or all of it was denied by the city, but the right to de-

termine on which side the truth lay was with the jury, and this court is bound by their finding thereon. We conclude, therefore, that the verdict is sustained by the evidence, and the trial court did not err in so holding.

The third objection is based on the contention that the court admitted evidence as to the condition of the walk at points too remote from the scene of the accident. At the place in the record pointed out by the appellant, in support of this contention, the following appears in the examination of a Mr. Sterns, a witness for the respondent:

"Q. How long have you lived there? [Meaning in the town of Mt. Vernon.] A. Three years the 16th of last July. Q. You know of the circumstances of Miss Harris getting hurt on that sidewalk last summer? A. Yes, sir. Q. You travel that sidewalk frequently, do you? A. Yes, sir. Q. I would ask you to state what was the general condition of that sidewalk at the time and prior to the time of this injury. Mr. Million: Defendant objects as incompetent, irrelevant, and immaterial. The Court: Objection overruled. Exception allowed. A. It was very bad. Q. Where was it bad; from what points? A. From the bottom to the top of the hill. Q. In what particulars was it bad? A. The stringers were loose; they were rotten and the blocking under them had rotted away and the boards were loose. Q. What about holes in the walk? A. There were several of them."

There was no error in this. It was permissible to show the condition of the walk for a reasonable distance on each side of the place of the injury, and as the quotation from the record shows all that appears as to the length of the walk, it is impossible to say that this rule was violated. Moreover, the next question and answer, to which there was no objection, shows the points between which the witness found the sidewalk bad. If, therefore, the first question could be said to be too broad, it was sufficiently narrowed by this explanation.

The instruction complained of was to the effect that evidence of the general condition of the sidewalk in the immedi-

ate vicinity of the place of the injury was proper to be considered by the jury along with the other evidence in the case in determining the question whether or not the sidewalk was out of repair at the place of the injury. This we do not think was prejudicial. While it may be that evidence showing a walk to be out of repair at one place is not direct proof that it was out of repair at another, yet evidence of its general condition in the vicinity of the accident is some evidence of its condition at the place where the accident happened.

The objection to the amount of the verdict is based on the contention that the physical condition of the respondent had its origin in other causes than the injury, rather than the contention that her physical condition did not justify the verdict. At the time of the trial, the respondent had developed a marked case of curvature of the spine, and it was the opinion of the only medical expert who testified that, while this condition could have been caused by the accident, it was not probable that it was so caused. On the other hand, it was shown by the testimony of the respondent and her immediate family that, prior to the injury, the respondent was a strong healthy woman, showing no symptoms of any of the ailments that developed immediately afterwards, while since that time she had been an invalid, incapable of pursuing her ordinary occupation, and that her condition was not improving. Under these circumstances, we think it was for the jury to say whether the injury was the cause of the respondent's condition, and inasmuch as they found that it was, we do not think their verdict excessive.

The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, DUNBAR, HADLEY, and RUDKIN, JJ., concur.

[No. 5686. Decided January 17, 1906.]

GEORGE GIES, *Respondent,* v. JAMES C. BROAD, *Appellant.*[1]

APPEAL—JURISDICTION—VALIDITY OF STATUTE SOLE GROUND—QUESTIONS REVIEWABLE. Upon an appeal in which the jurisdiction of the appellate court depends upon the validity of a statute, the court will not review other errors assigned not involving such question.

LABOR—PUBLIC WORK—FIXING MINIMUM WAGE FOR DAY'S WORK—CONSTITUTIONAL LAW—ORDINANCE—VALIDITY. An ordinance prescribing the minimum wage to be paid for a day's labor upon public work undertaken by a city is not unconstitutional, as it is within the power of the state or city to prescribe the conditions upon which it would permit its public work to be done.

Appeal from a judgment of the superior court for Spokane county, Belt., J., entered October 20, 1904, affirming, on appeal from a justice's court, a judgment in favor of a laborer on public work, for time in excess of the period prescribed by ordinance as a day's work. Affirmed.

Cullen & Dudley, for appellant.

Robertson, Miller & Rosenhaupt, for respondent.

FULLERTON, J.—The respondent commenced an action in the justice's court for Spokane precinct, in Spokane county, to recover a balance of $15.91 claimed to be due him as wages for services rendered the appellant. He recovered in the justice's court, and the judgment was affirmed on appeal to the superior court of Spokane county. This appeal is from the judgment of the superior court. From the record it appears that the appellant had a contract with the city of Spokane for the improvement of one of its streets. By ordinance of that city it is provided that on all work done by contract for the city in the improvement of its streets, eight hours in any calendar day shall constitute a day's work, and that the rate of wages for laborers on such work who labor by the day shall not be less than two dollars and twenty-five

[1]Reported in 83 Pac. 1025.

cents for a calendar day's work of eight hours. The respondent had worked nine hours in each calendar day, and had been paid wages at the minimum rate fixed by the ordinance. The action was instituted to recover for the extra time the respondent labored in excess of the time fixed as a day's work by the ordinance.

The appeal is brought within the jurisdiction of this court by reason of the fact that the action involves the validity of the ordinance above mentioned; the appellant contending that that part of the ordinance which fixes the minimum sum to be paid as wages for a day's labor on any public improvement undertaken by the city of Spokane, is unconstitutional and void. He has, however, suggested reasons for reversing the judgment even should we determine the ordinance to be valid, but it is evident that under the rule announced by us in *Henry v. Thurston County,* 31 Wash. 638, 72 Pac. 488, these questions are not before us. In that case we held that, on an appeal where we had jurisdiction solely because the validity of a statute was involved, we would review the judgment appealed from only in case we found the statute invalid, and then only to the extent that it was affected by the invalid statute. This rule precludes any inquiry as to the proper construction of the ordinance. If we find the ordinance valid, the inquiry is ended; if invalid, the judgment falls because founded on the ordinance.

The question properly before us, namely, the validity of that part of the ordinance which undertakes to fix a minimum sum to be paid as wages for a calendar day's work, was in effect decided by us in the case of *In re Broad,* 36 Wash. 449, 78 Pac. 1004. There the question was whether that part of the ordinance was valid which limited the number of hours a laborer should be permitted to labor in any one calendar day on a public work undertaken by the city, and we held it valid on the principle that it was within the power of the state (and a city as its instrumentality) to prescribe the con-

ditions on which it would permit public work to be done on its behalf, founding the decision on the case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148. The principle involved in that case is not distinguishable from the principle involved in the case now before us. For, surely, if it be within the power of the state to limit the number of hours a laborer may be permitted to labor in one calendar day on any public work undertaken by it, it can fix the minimum sum that shall be paid him as wages for such labor. The power to do either must rest on the principle that "it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin v. Kansas, supra.* These considerations dispose of the errors assigned.

The judgment is affirmed.

MOUNT, C. J., HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

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41 450
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[No. 5907. Decided January 19, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Addie V. Lowary, Plaintiff*, v. THE SUPERIOR COURT FOR LINCOLN COUNTY *et al., Respondents.*[1]

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—PROOF. A case in the supreme court will not be dismissed because of the cessation of the controversy unless such fact is shown by clear and satisfactory proof; and a signed statement that the case has been settled is not sufficient where it is disputed and claimed to have been signed through mistake and fraud.

CERTIORARI — TIME FOR APPLICATION — EXCUSE FOR DELAY — ILL HEALTH AND INCOMPETENCE OF APPLICANT. While ordinarily an application for a writ of certiorari must be made within the time limited for taking an appeal, sufficient excuse is shown for delay in apply-

[1]Reported in 83 Pac. 726.

ing for a writ to review an order appointing a guardian for the applicant, where it appears that the applicant was ill and unable to act, and the respondent had alleged that she was incompetent.

GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—NOTICE OF APPLICATION—JURISDICTION. The court is without jurisdiction to appoint a guardian for an incompetent person unless notice is served upon the person having the care, custody and control of such incompetent, the provision for notice being mandatory.

SAME—RECORD—NOTICE—ATTENDANCE AT HEARING. The record on the appointment of a guardian for an incompetent person must show that the required notice was given, and that the person was present in court at the hearing or was unable to attend.

Certiorari to review orders of the superior court for Lincoln county, Neal, J., entered August 16, and October 18, 1904, appointing a guardian for an incompetent person, and refusing to vacate the same. Reversed.

Mendenhall, Rhodes & Pence, for relator.

H. A. P. Myers, for respondents.

RUDKIN, J.—On the 23rd day of July, 1904, A. D. Strout filed a petition in the superior court of Lincoln county, praying for the appointment of himself, or some fit and proper person, as guardian of the person and estate of his daughter, Addie V. Lowary, on the ground that she was mentally incompetent to manage her property, and that she had property needing care and attention. The petition averred that said Addie V. Lowary was a resident of said Lincoln county, and had no relatives residing therein except the petitioner and his wife, but did not set forth who, if any person, had the care, custody, and control of said Addie V. Lowary. August 3, 1904, was fixed as the date for the hearing of said application, and on the 23rd day of July, preceding, notice of such hearing was personally served on said Addie V. Lowary by the sheriff of Lincoln county. The matter was continued until the 16th day of August, 1904, and on the latter date a hearing was had and an order made, appointing the petitioner guardian as prayed. At such hear-

ing said Addie V. Lowary did not appear in person, but one Mulligan and the prosecuting attorney of Lincoln county appeared in her behalf.

On the 30th day of September, 1904, said Addie V. Lowary filed a petition for the vacation of the order appointing the guardian, on numerous grounds—among others, that she was not a resident of Lincoln county at the time said application was made, and had not resided in said county for more than one year prior thereto. On the 18th day of October, 1904, the petition to vacate was denied. On the 2nd day of October, 1905, application was made to this court for a writ of review to review the order appointing the guardian and the order refusing to vacate the appointment. The writ was allowed, and the matter is now before us for final determination.

On the 2nd day of December, 1905, the respondent filed in this court a statement, signed by the relator, reciting that the matter in dispute has been satisfactorily adjusted, and praying that this proceeding be dismissed. In opposition to this motion there has been filed affidavits of the relator and her husband, to the effect that if any such statement was signed by relator it was signed through mistake and obtained through fraud. This court will not dismiss a case because of a cessation of the controversy, unless such cessation is shown by clear and satisfactory proof. No such showing is made in this case, and the motion to dismiss is accordingly denied.

It was further contended by the respondent that the writ was not applied for within the time limited by law. The statute does not fix the time within which such applications must be made, but the courts by analogy apply the limitation fixed by law for the prosecution of an appeal. Ordinarily this court will not entertain jurisdiction of an application of this kind after the time limited by law for prosecuting an appeal has expired, but it appears from the application before us that the relator was in ill health, and was deprived

of her property by the order complained of, and was thus without means to give bond or employ counsel to prosecute an appeal. In addition to this, the respondent charged, and the court found, that she was incompetent to manage her affairs, and the respondent who preferred the charge will not now be heard to gainsay it. This court will therefore assume, for the purpose of protecting her rights, that the relator was in fact incompetent, and in view of these facts we are of the opinion that the application was timely made.

On the merits of the case little need be said. It clearly appears that both the order appointing the guardian and the order refusing to vacate the appointment are erroneous. The statute provides that notice of applications of this kind must be served on the minor or incompetent person, and on the person having the care, custody, and control of such minor or incompetent person, and that the person for whom a guardian is sought must be present at the hearing if able to attend. The former of these requirements at least is jurisdictional. A proceeding for the appointment of a guardian is statutory, and the requirement that notice shall be given is mandatory. Ordinarily the notice to be served on the minor or incompetent person is of far less importance than the notice required to be served on the person having the care, custody, and control. The minor may be of such tender years, or the incompetent person so far bereft of reason, that the notice served upon them is little more than a formality, whereas, the law presumes that those having the care, custody, and control of such persons have at least sufficient interest in their welfare to see that their legal rights are protected.

The record should therefore show that the required notice was served, or that there was no person upon whom service could be made, and that the person for whom the guardian is sought was present at the hearing or was unable to attend. The record before us not only fails to show these facts, but it was made manifest to the court on the petition to vacate the order of appointment that the relator was in the care,

custody, and control of certain persons at the time of the application, and that no notice of the application was served upon them; that the relator was able to attend at the hearing and did not, and in addition to all this that the relator was not a resident of Lincoln county at the time of the application and had not been for more than one year prior thereto. The court was therefore without jurisdiction and its judgment is a nullity.

The judgment is reversed and the cause remanded, with directions to vacate the order appointing the guardian and require the respondent to account for all moneys or property received by virtue of his appointment.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5906. Decided January 19, 1906.]

CAPITAL NATIONAL BANK, *Respondent*, v. J. W. ROBINSON, *Appellant*.[1]

BILLS AND NOTES — PAYMENT — WHAT CONSTITUTES — DEPOSIT BY SURETY AS SECURITY FOR JUDGMENT AGAINST PRINCIPAL MAKER—CONTRACTS—CONSTRUCTION. Payment of a promissory note by a joint maker who claimed to have signed as surety only, is not shown where it appears that the surety, after giving notice to the bank of the suretyship, and requesting suit to be instituted against the principal maker, entered into a written agreement with the bank, and with its president acting as a trustee and not in his official capacity, under the terms of which the surety deposited with the trustee a sum sufficient to pay the note and costs of suit, to be held until final judgment against the principal maker, and the bank agreed to at once institute a suit thereon without making the surety a party defendant, the deposit to be returned in case of payment by the principal maker, and the judgment to be assigned to the surety if not paid; it being a prerequisite to the bank's receiving the deposit that it should reduce the claim to judgment; and it being specifically stipulated that the transaction should not be considered a payment of the note, but that the deposit shall be held only as security for any judgment that might be obtained (ROOT, J., dissenting).

[1]Reported in 83 Pac. 1021.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered April 26, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Vance & Mitchell, for appellant.

G. C. Israel, for respondent.

PER CURIAM.—The plaintiff, the Capital National Bank, a corporation, brought this action on a promissory note against the defendant J. W. Robinson. A demurrer was interposed to the complaint, which was overruled; whereupon the defendant made application to have George A. Mottman, who had signed the note sued upon jointly with the defendant, made a defendant in the action, which application was denied. Thereupon the defendant answered, denying certain allegations of the complaint, and averring that the plaintiff was not, at the date of the institution of the suit, and was not then, the owner of said promissory note sued upon; but that said note had been paid in full to the plaintiff, and that such payment was made by George A. Mottman, the party who signed said note jointly with defendant. The reply denied this allegation, and the cause went to trial, and judgment was entered in favor of plaintiff, the respondent here. From such judgment this appeal is taken.

The main contention of the appellant is that a certain written agreement which was offered in evidence, and the testimony in the case, show that the suit had not been commenced by the real party in interest, and that the debt had actually been paid by Mottman to the bank. Prior to the commencement of the action, Mottman, who had signed the note with appellant Robinson, gave notice to the bank, under the provisions of the statute, to forthwith institute action upon said note, alleging that he was a surety upon said note, and the following agreement was entered into between Mottman and the Capital National Bank, by C. J. Lord, its president:

"And Whereas, The said second party is desirous of having said note collected without suit or action against him upon the same; And Whereas, The said second party does not desire to pay the said note or discharge the obligation of himself and the said J. W. Robinson thereon.

"Now, Therefore, For the purpose of enabling the first party to proceed to the collection of said note without the necessity of making the second party a party defendant to an action on said note, the said second party has this day deposited with C. J. Lord, of Olympia, Thurston County, State of Washington, the president of said first party, as trustee for the carrying into effect of this escrow, the sum of seventeen hundred dollars ($1,700) to be by him held and subsequently applied as follows, to wit: The said first party shall within five days commence action against J. W. Robinson individually upon said note and proceed with due diligence to the obtaining of a final judgment upon the same. In the said cause and prosecution of same, aside from principal, interest and costs, attorney's fees shall be asked and allowed not to exceed as follows, to wit; and to be included in said judgment: 1st. If judgment is obtained by default of said J. W. Robinson, attorney's fees not to exceed twenty-five dollars ($25). 2nd. If judgment is obtained after appearance and issue joined by said J. W. Robinson in the superior court, then attorney's fees not to exceed seventy-five dollars ($75). 3rd. If the said J. W. Robinson shall prosecute an appeal to the supreme court from any judgment obtained in the said superior court, then attorney's fees not to exceed one hundred and fifty dollars ($150). In case of appeal the said Capital National Bank agrees to require the sureties on appeal or supersedeas bond in case of a personal bond to justify and be accepted by the trial court and to assign any judgment rendered on appeal, in favor of said Capital National Bank to party of second part or such party as he shall direct.

"The said C. J. Lord as trustee shall deposit such escrow moneys with the said first party in its general funds and have issued unto himself as such trustee a certificate of deposit for the same. Upon the obtaining of a final judgment against the said J. W. Robinson upon the said note, the said C. J. Lord shall pay said first party the amount of said judgment including all costs, and attorney's fees out of the said escrow

money, and if there be any surplus remaining, pay the same to the said second party. In case there be any deficiency between the amount of said judgment and the amount of said escrow deposit, the said second party shall immediately pay the said first party the difference existing between said sums. The first party shall thereupon assign to any person whom said second party may direct, the said judgment. It is mutually agreed and understood by the parties hereto, that the said deposit in escrow is not made in any way as a discharge or in payment of said note, but only as security for the payment of such judgment as may be obtained upon said note. It is further agreed that if the said J. W. Robinson shall at any time satisfy and discharge the said note, pending the said action or any judgment obtained thereon, that the said escrow deposit shall be forthwith returned to said second party. It is further agreed that upon deposit of said escrow money as aforesaid in the settling of the judgment obtained, for the payment of which the sum is deposited as security, that at the time of settlement, irrespective of the amount of interest accrued on said note after action and included in said judgment there shall be deducted from the amount necessary to settle said judgment, an amount equal to eight per cent (8 per cent) of said principal sum of $1,390, from the date of said escrow deposit to the date of such settlement. The first and second parties hereby mutually covenant and agree to and with each other that each will make faithful performance of all promises and agreements herein required on his or its part to be performed.

"In Witness Whereof, All of the said parties have hereunto set their hands and executed the foregoing agreement by their proper officers in duplicate, this 5th day of March, A. D. 1904. Capital National Bank by C. J. Lord, President. Geo. A. Mottman, Second Party, C. J. Lord, Trustee."

The statement of facts is simply a resume of the testimony, which is very brief. It appears that, in accordance with the contract, the money was paid to Lord, as trustee for the bank, Lord paying the money into the general fund of the bank and taking a certificate of deposit for the same. There is testimony in relation to the payment of a docket fee and taking out of a second certificate with that amount deducted, which

does not seem to us to be material. The essential question is whether the conditions of this contract, and the payment into the bank by the trustee Lord, constituted a payment of the note by Mottman. We do not think they did. The fact that the trustee Lord was the president of the bank does not affect the legal status of the transaction. It appears from the agreement, and from the testimony of Lord, that he acted as trustee only, and while the money went into the general fund of the bank, it went there subject to Lord's call, the same as it would have done if it had been deposited by any one else.

Mr. Lord testified, that the certificate was assignable, and that the bank never had any custody or control of the money save such as it obtained by virtue of its being deposited with the bank; that the money so deposited was received by the bank under and pursuant to the terms of a written agreement between himself and Mottman, and that his connection with the transaction was that of an individual acting as trustee, and not as an officer of the bank. There was no testimony tending to dispute this unless it could be gathered from the provisions of the contract, and that the contract was not intended to operate as a payment of the debt is evident from the terms of the contract itself, which provides that it is mutually agreed and understood by the parties hereto that the said deposit in escrow is not made in any way as a discharge or in payment of said note, but only as security for the payment of such judgment as may be obtained on said note.

While it may be true that a statement of this kind might not weigh against the terms of a contract which, as a legal proposition, would constitute payment, yet it may be considered for the purpose of arriving at the intention of the contracting parties by showing what construction they placed upon it. A prerequisite, under this contract, to the bank receiving this deposit as its money was that it should reduce the claim to judgment, and under the terms of the contract

it could not have claimed this money at the hands of the trustee without such an action on its part. There would have been nothing to prevent the holder of this certificate (the deposit and the certificate having constituted the bank and the depositor a debtor and creditor) from presenting it and obtaining the money which he had deposited. The contract was one which the parties had a right to enter into for the purposes therein expressed, and did not, we think, constitute a payment of the debt.

The judgment is affirmed.

ROOT, J. (dissenting) — I feel constrained to dissent. Brushing aside forms, and having regard to substance, it seems to me that Mottman paid the note and was thereafter the only party authorized to maintain an action thereon.

[No. 5716. Decided January 19, 1906.]

C. W. WALDRON, *Appellant,* v. J. H. KINETH, *Respondent.*[1]

HOMESTEADS — EXECUTIONS — SALE — PRACTICE — OBJECTIONS — EXEMPTION — CONSIDERING AT HEARING ON CONFIRMATION. Upon the sale under execution of real estate of the value of less than $1,000, duly claimed by the judgment debtor as a homestead prior to sale pursuant to the homestead law of 1895, the sale is void unless made under appraisement and in the manner required by such law, and should not be confirmed.

SAME — SALE ON GENERAL EXECUTION — FAILURE TO COMPLY WITH HOMESTEAD ACT — VALIDITY. The question whether real estate sold under execution was at the time exempt as the homestead of the judgment debtor may be heard and determined by the court upon the motion for confirmation of the sale.

Appeal from an order of the superior court for Island county, Hatch, J., entered February 13, 1905, in favor of the defendant, after a hearing on an application for con-

[1]Reported in 84 Pac. 16.

firmation and objections thereto, refusing to confirm, and setting aside, an execution sale of real estate. Affirmed.

John F. Reed, for appellant.

Lester Still, for respondent.

Crow, J.—On June 18, 1900, appellant recovered in the superior court of Island county, a personal judgment against respondent for $363.80 and costs, and on October 21, 1904, caused an execution to be issued thereon, which the sheriff of said county levied upon three hundred and twenty acres of land belonging to respondent. Thereafter on December 3, 1904, said sheriff, having first advertised said land, sold the same under said execution to appellant for $563.63, the full amount of his judgment, including interest, costs, and accrued costs. After the levy of said execution, but before sale, respondent, being the head of a family consisting of himself, his wife, and one minor child, filed with the auditor of Island county a declaration of homestead on all of said land, in accordance with the requirements of chapter 64, Laws 1895, pp. 109-114. He had previously resided on the land with his family, but prior to the date of the execution had temporarily left the same, and was residing with his mother on an adjoining tract, with the intention, however, of returning to his homestead, which he did prior to said execution sale.

On the date of the sale, respondent appearing in person and by attorney, claimed said homestead as exempt, and protested against said sale, with which the sheriff proceeded, and at which appellant was the only bidder. Appellant made no attempt to secure a sale of such homestead in the manner provided by said chapter 64, Laws 1895. The sheriff's return of sale was filed December 19, 1904, and within ten days thereafter respondent filed written objections to confirmation on the grounds, (1) that said land was his homestead; (2) that no appraisement thereof had been made as

required by law; and (3) that the sum bid and for which the land was sold was less than his homestead exemption. Appellant having moved for confirmation, his motion and respondent's objections were heard together on February 13, 1905, at which time the court admitted and considered evidence for the purpose of determining whether said land was in fact respondent's homestead and exempt as such, and thereupon finding the same to be his homestead, entered an order setting aside said sale. From said order, this appeal has been taken.

Several assignments of error have been presented which involve but one question, was appellant entitled to an order confirming said sale? Respondent's objections were based upon the contention that, as said land was his homestead, and as he had filed his declaration and claimed his exemption prior to sale, and as there is no claim or pretense that appellant in seeking to enforce his execution applied to the court for the appointment of appraisers or that appraisers were appointed or that any appraisement was made or that appellant in any manner proceeded in accordance with said chapter 64, Laws 1895, therefore such pretended sale was without authority of law and void. We think this contention should be sustained.

Appellant, however, insists that the question as to whether said land was in fact respondent's homestead and exempt as such, cannot be tried or determined upon the hearing of a motion for confirmation, but that, upon such hearing, the only question for consideration under Laws 1899, p. 87, § 6, is the regularity or irregularity of the sale proceedings; citing, *Krutz v. Batts,* 18 Wash. 460, 51 Pac. 1054, and *Harding v. Atlantic Trust Co.* 26 Wash. 536, 67 Pac. 222. While certain language used in said cases, when considered apart from the peculiar facts and issues there involved, might seem to sustain appellant's theory of the practice, yet we think his contention is utterly inconsistent with principles announced

by us in *Field v. Greiner,* 11 Wash. 8, 39 Pac. 259, and *Whitworth v. McKee,* 32 Wash. 83, 72 Pac. 1046.

Because of an apparent conflict between the two cases last mentioned and those cited by appellant, we have taken occasion to examine the original record in *Krutz v. Batts, supra,* and find that the original default judgment therein was entered upon proof of personal service made without the state of Washington and also a further service by publication; that real estate belonging to the defendants had been attached; that said real estate was sold on April 18, 1896, on execution issued on said judgment, and was returned and entered for confirmation on April 20, 1896; that on May 15, 1897, long after the time for filing objections had expired, the defendants, who had not theretofore appeared but then claimed to appear specially, filed written objections to the confirmation of said sale; that said objections were based entirely upon the contention that the judgment had been entered without jurisdiction, and was void for the want of any lawful service of summons. No attempt was then made in said objections to claim any exemption or homestead; the fact being that, before making said objections, the defendants had sold and conveyed the real estate to a third party, who also filed written objections to said execution sale. Afterwards on June 1, 1897, amended objections were filed by the defendants in which a casual reference was made to the claim that said real estate had been their homestead, but even in such amended objections their only contention was that the judgment was void. The entire record discloses that the only issue considered was whether said judgment, which was regular on its face, was in fact void. After numerous hearings and continuances, the trial court finally entered an order which expressly recited that the defendants' objections to confirmation were sustained for the reason that said judgment was null and void, and that the law did not require the court to do a needless or useless thing. It will thus be seen that

no determination was attempted to be made as to whether or not the land was in fact a homestead.

Upon appeal this court reversed the order of the trial court for the reasons: (1) that the objections to confirmation were filed too late; (2) that the proceedings instituted by the defendants simply amounted to an unauthorized collateral attack upon a judgment which, upon its face, appeared to be in all respects regular and valid. In the opinion this court said: "It will thus be seen that the only question which the court has a right to investigate is a question of irregularity in the proceedings concerning the sale." There was no showing of any such irregularity, nor any showing that the trial court even considered said question, which would properly come before it on a motion to confirm, or on objection to confirmation. In fact the record does show that on said hearing, instead of investigating the question of any irregularity in the proceedings concerning the sale, the trial court undertook to pass upon the validity of a judgment which was regular upon its face and disclosed proper service of process, and assumed to declare such judgment to be null and void.

In the later case of *Harding v. Atlantic Trust Co., supra,* the above language which we have quoted from *Krutz v. Batts* was quoted with approval by Reavis, C. J. Immediately after making such quotation, the learned Chief Justice said, "The rights concerning the homestead could not have been heard or determined upon the motion to confirm the sale." We do not think this sweeping statement is a corollary of any principle announced in *Krutz v. Batts,* and we cannot adopt the same to its full extent. The record in *Harding v. Atlantic Trust Co.* fails to show that, on the hearing of the motion for confirmation, the trial court had undertaken to try, or did try or decide, the question of fact as to whether the land involved was a homestead. It does appear that an order of confirmation had been made, and in that respect the conditions were different from those in this case, in which the question of the existence of the homestead was tried and the

objections to confirmation were sustained for the reason that the proceedings concerning the sale were irregular as proceedings for the sale of a homestead on execution under the homestead act of 1895. Laws 1895, pp. 109-114.

In *Field v. Greiner, supra,* on appeal from an order sustaining objections and refusing to confirm a sale of the judgment debtor's homestead, this court, speaking through Hoyt, C. J., said:

"When the execution so issued was levied upon the property, it was within the power of the respondents to prevent a sale thereof by selecting it as a homestead, and it is not questioned but that the necessary steps for the purpose had been or were taken. It follows that after such selection the property could not be sold except in such a manner as to protect the homestead rights of the respondents. This was the conclusion to which the superior court arrived, and the order appealed from must be affirmed."

Again in *Whitworth v. McKee,* Fullerton, C. J., said:

"It is also contended that the sale was valid notwithstanding the respondents may have had a homestead therein. The argument is that the homestead was of greater value than one thousand dollars, and could be lawfullly sold for the excess, and that the decree, for that reason, instead of vacating the sale, should have directed that the value of the homestead be paid over to the respondents out of the purchase price of the property. Cases are cited from other jurisdictions where this contention is maintained, but, without stopping to review them specially, we think they are inapplicable under a statute like ours. Under our statute a sale of a homestead is not voidable merely, but absolutely void, when had under a general execution. It can be sold at no time except for its excess of value, and this only after certain requirements provided by the statute are complied with. It seems unnecessary to argue that, when an involuntary sale of real property is required to be made in a particular manner, no other manner of sale will pass title."

There can be no question but that the sale in this case was irregular, there being an utter failure to comply with any of the requirements of the homestead act of 1895. Under the

principles so well announced in *Whitworth v. McKee, supra,* said sale, being that of a homestead, was absolutely void, for a homestead cannot be sold on a general execution in any manner other than as provided in said homestead act of 1895. As the sale herein was void, it could convey no title to appellant, and it would be an idle proceeding for us to now make an order directing the superior court to confirm the same. The only possible result of such an order would be to promote unnecessary and vexatious litigation, by compelling respondent to seek an adjudication of his rights in some future action to be instituted by him for the purpose of removing a cloud from his title. The trial court having found said land to be respondent's homestead, committed no error in refusing to confirm the sale.

The judgment is affirmed.

MOUNT, C. J., ROOT, HADLEY, RUDKIN, and DUNBAR, JJ., concur.

[No. 5999. Decided January 19, 1906.]

EDWARD TRUDEAU, *Appellant,* v. AMERICAN MILL COMPANY, *Respondent.*[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY TO EMPLOYEE DUMPING LOAD OF WOOD—COMPLAINT—SUFFICIENCY. The complaint in an action for personal injuries sustained by a teamster in the defendant's employ is insufficient, in that it shows that the plaintiff was guilty of contributory negligence which proximately caused the injury, where it appears therefrom that in using a dumping device on a wagon, known by him to be out of repair, and from which it was difficult to remove the wrench used in dumping the load, the plaintiff unnecessarily assumed a position where he would be struck by the wrench in case he was unsuccessful in removing it.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered September 25, 1905, upon sustain-

[1]Reported in 83 Pac. 725.

ing a demurrer to the complaint, dismissing an action for personal injuries. Affirmed.

Govnor Teats, for appellant.

J. B. Bridges, for respondent.

RUDKIN, J.—The complaint in this action alleges substantially the following facts: The plaintiff was in the employ of the defendant as a teamster, engaged in hauling and delivering wood from the defendant's mill, in the city of Aberdeen. The wagons used by the plaintiff in this work were furnished with a platform about even with the top of the wheels, on the top of which was a large, cumbersome box in which the wood was placed. This box was moved back and forth on the platform by means of an endless chain and shafting, for the purpose of unloading. The shafting extended to the side of the platform and box, about the center thereof, and the box was moved back and forth by the teamster by means of a large wrench placed on the shafting.

At the time the plaintiff entered the employ of the defendant, on the 18th day of December, 1904, the shafting on one of the wagons was bent so that it was difficult to remove the wrench from the shafting when the load began to dump. This wagon was only used a portion of the time. On or about the 10th day of January, 1905, the plaintiff complained to the superintendent of the mill of the defective condition of this shafting, but nothing appears to have been done in regard thereto. On or about January 18, the plaintiff complained to the blacksmith in the defendant's employ, but was by him informed that he had no authority to make repairs unless directed so to do by the millwright. The plaintiff thereupon sought the millwright, and they went together to the blacksmith. They found the latter busy, but the millwright and blacksmith promised to make the necessary repairs at the first opportunity.

Soon thereafter the mill closed down, and when the plaintiff returned to work on or about the 22d day of February,

he discovered that the shafting had not been repaired. He again sought out the blacksmith, and the latter again promised to make the repairs within a few days. The plaintiff continued at work and, on the 25th day of February, 1905, was delivering a load of wood, and

"When undertaking to dump the said load of wood, and when the said box had reached about the point of the equilibrium, and at the point of dumping, he undertook to remove the said wrench, as was necessary for him to do, from the said shafting, but due and owing to the said defective condition of the same, he was unable to do so, the box fell to the ground, the shafting suddenly and with great force was whirled around carrying with it the said wrench, which struck the plaintiff upon the left temple and side of the head," etc.

To this complaint a demurrer was sustained for want of sufficient facts. The plaintiff elected to stand on his complaint, and refused to plead further. A judgment of dismissal was thereupon entered, from which this appeal is taken.

The defect in the shafting in question was open and apparent, the appellant had full knowledge thereof, and of the dangers incident to its use, and had he received the injuries complained of at any time before the promise to repair was given, the defense of assumption of risk or contributory negligence would necessarily have barred a recovery. If we concede that the appellant did not assume the risk arising from the use of the defective appliance after complaint was made, by reason of the promise to repair, yet he was in duty bound to exercise reasonable care and caution, in view of the defective condition of the appliance which he was handling. His care must be commensurate with the danger. In other words, he must exercise due and reasonable care under the particular circumstances. *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632; *Indianapolis etc. R. Co. v. Watson* 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578.

It is true, as contended by the appellant, that the facts are admitted by the demurrer; but the court is not bound to

accept every inference the pleader may draw from these facts. For instance, it is apparent from the complaint that it was not necessary for the appellant to keep the wrench on the shafting until the load began to dump. The wrench might readily have been removed before the load reached the dumping point. The rest could have been accomplished in entire safety by a lift on the front, or by pulling down on the load from behind. Again, it is not apparent to the court why the appellant should assume a position where the wrench would strike him in the event that he continued the use of the wrench until the load commenced to dump. In view of all the circumstances, we are of opinion that the appellant was guilty of contributory negligence which was the direct and proximate cause of his injury.

The demurrer was properly sustained, and the judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 5815. Decided January 20, 1906.]

GEORGE F. BRILL, JUNIOR, *Respondent*, v. EUGENE HAYFORD, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS—CONFLICTING EVIDENCE. **Findings of the trial court upon conflicting evidence in an equitable action will not be disturbed on appeal where the supreme court is unable to say that the evidence does not preponderate in favor of the respondent.**

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 2, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

James Dawson, for appellant.

T. D. Rockwell, for respondent.

[1]Reported in 83 Pac. 1119.

PER CURIAM.—The appellant entered into a written agreement with the respondent in which he acknowledged receipt of the sum of $5, as part payment of the purchase price of two certain lots, situated in the city of Spokane, and agreed to convey the lots by warranty deed to such person as the respondent should direct, on the payment of the further sum of $245, if paid within six months from the date of the execution of the agreement. Before the expiration of the time fixed in the agreement, the respondent tendered the balance remaining due on the contract, and demanded a deed of the property to himself. The appellant refused to execute the deed and this action was brought to compel him to do so. Judgment went for the respondent and this appeal is taken therefrom.

The appellant defended the action on the ground of fraud and misrepresentation. He contended that the respondent had been, for some time prior to the execution of the agreement, his agent for the sale of the property, and had, as such agent, acquired information concerning the property and its surroundings which he purposely and fraudulently concealed from the appellant; and that the appellant by reason of such fraudulent concealment was induced to enter into a contract for the sale of the property at less than its actual value, and a contract he would not have entered into had the respondent dealt fairly with him. The case was tried out on this issue, and much testimony introduced on each side. The evidence of the parties is squarely in conflict, and we are unable to say, after its careful perusal, that it does not preponderate in favor of the respondent.

The judgment is affirmed.

[No. 5862. Decided January 20, 1906.]

THE STATE OF WASHINGTON, *Appellant*, v. GIFFORD W. PHELPS, *Respondent*.[1]

CRIMINAL LAW—OBTAINING PROPERTY UNDER FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information for the offense of obtaining property under false pretenses sufficiently states the essential elements of intent to defraud, the design, and the means by which the fraud was perpetrated, where it is charged that the accused obtained the signature of one B. to a promissory note by means of false representations respecting the organization of a bank at a particular place, that certain parties had subscribed for its stock, that a little ready money was required for a certain purpose, which could be procured on said note, and that a certain banker had sent the accused to said B. for that purpose; since all these statements were representations of material, past, or present facts calculated to deceive said B. and induce him to deliver the note, which was a thing of value although not made to a definite payee (RUDKIN, J., dissenting).

SAME—INFORMATION—SUFFICIENCY—TENDENCY TO DECEIVE. Any pretense which actually deceives the person defrauded is sufficient to sustain a conviction of the crime of obtaining property under false pretenses, it not being essential that it be sufficient to deceive a person of ordinary intelligence.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered June 26, 1905, upon sustaining a demurrer to an information, dismissing a prosecution for obtaining property under false pretenses. Reversed.

Walter Staser and *Zent & Lovell*, for appellant.

O. R. Holcomb, for respondent.

FULLERTON, J.—On June 26, 1905, the respondent was under arrest in Adams county, accused of the crime of obtaining property under false pretenses. On that day the prosecuting attorney of Adams county filed an information against him in the following language:

"Comes now Walter Staser, prosecuting attorney and county attorney in and for Adams county, Washington, and

[1]Reported in 84 Pac. 24.

by this information accuses Gifford W. Phelps of the crime of obtaining a thing of value under false pretenses, committed as follows, to wit: That the said Gifford W. Phelps, in the county of Adams and State of Washington, then and there being, on or about the twelfth day of May, 1905, and within one year last past, did then and there, designedly, and with intent to defraud another, by false and fraudulent pretenses, to wit: That, the said Gifford W. Phelps was organizing a banking corporation to do a general banking business at Lind, Adams county, Washington, and that James Nielson and Dugal Nielson had subscribed for and purchased ten thousand dollars worth of the capital stock of the said corporation; that it was necessary to purchase some furniture and fixtures to be used in the said bank; that a certain person, O. H. Greene, of Ritzville, Washington, had told and represented to the said Gifford W. Phelps that the said furniture and fixtures could be purchased at a bargain in the city of Spokane, Washington, if purchased at once for cash; and the said O. H. Greene had advised and directed the said Gifford W. Phelps to procure from B. F. Berry a promissory note for about eight hundred fifty dollars, and he, the said O. H. Greene, or the Pioneer State Bank of Ritzville of which he was cashier, would cash the said note and advance the money thereon: obtain a thing of value to wit: did induce the said B. F. Berry to sign, execute and deliver, a certain written instrument which was in the following words and figures to wit:

" '$850. Ritzville, Wash., May 13, 1905.

" 'Six months after date, without grace, ———— promise to pay to the order of ———— eight hundred and fifty dollars and none hundredths in gold coin of the United States at the rate of one per cent per month from date until paid for value received. Interest to be paid ———— and if not so paid the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note or any part thereof, ———— promise and agree to pay, in addition to the costs and disbursements, provided by statute ———— dollars in like gold coin for attorney's fees in said suit or action.

" 'Due ———— 190—. G. W. Phelps.

" 'At ———— No. —. B. F. Berry.'

"That all of the statements and representations above enumerated, were false, fraudulent and untrue, and were known by the said Gifford W. Phelps to be false, fraudulent and untrue; and that by the said false and fraudulent representations and pretenses, as aforesaid, the said Gifford W. Phelps did obtain from the said B. F. Berry the aforesaid promissory note, and the said representations were made designedly and for the purpose of deceiving and defrauding the said B. F. Berry in obtaining a thing of value, to wit: the promissory note, and the aforesaid note was a thing of value, and the said B. F. Berry then and there believed, relied and acted upon all of the aforesaid representations contrary to the form of statute in such cases made and provided, and against the peace and dignity of the state of Washington."

To this information the respondent interposed a general demurrer, which the trial court sustained. The prosecuting attorney on behalf of the state thereupon elected to stand on the information, upon which the court discharged the respondent and dismissed the action. The state appeals.

The question presented is, does the information state facts sufficient to constitute a crime? Before a person can be convicted of the statutory crime known as obtaining money or other property under false pretenses, it must be made to appear that the person did, with intent to defraud, designedly, by color of some false token or writing, or by some false pretense, obtain from another some one or more of the things enumerated in the statute, or something of value not therein specially enumerated. And, of course, an information, in order to state facts sufficient to constitute a crime, must allege the intent to defraud, the design, the means used by which the fraud was practiced, and must describe the articles, or thing of value obtained. Measured by these tests, it is at once apparent that the information before us does sufficiently allege the intent to defraud, the design, and sufficiently describes the thing of value obtained from the prosecuting witness. The only essential about which there can be any question is the allegation concerning the means used to induce

the prosecuting witness to part with his property. The argument against the sufficiency of this part of the information is two-fold; it is said, first, that the representations made were neither of past or present facts, nor calculated to deceive; and, second, that they were insufficient to deceive a person of ordinary prudence and common intelligence.

But it seems to us that neither of these objections are well taken. The representations which induced the prosecutor to part with his property are clearly of past or present facts. We think, also, that they were pertinent to the matter the respondent desired to accomplish; in other words that they were calculated to deceive. The representation that respondent was organizing a bank to do a general banking business at a particular place; that certain persons had taken stock therein; that it was desirable at that time to have a little ready money for a particular purpose; that it could be obtained upon the prosecutor's note, and that a certain banker had sent the respondent to the prosecutor to procure the note; were all representations of material past or present facts, calculated to deceive the prosecuting witness and induce him to deliver over to the respondent property that he would not otherwise deliver over.

As to the second objection, it is the rule in Indiana and perhaps one or two other states, that a false pretense to be criminal must be of some fact as would tend to deceive a person of ordinary prudence and common intelligence *(Clifford v. State,* 56 Ind. 245; *State v. Burnett,* 119 Ind. 392, 21 N. E. 972); but the great weight of authority is to the opposite effect. The general rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment or information, and hence, sufficient to sustain a conviction. 3 Words & Phrases, 2664. Therefore, while the foregoing information is not recommended as a model, we think it states a crime, and that the trial court erred in sustaining the demurrer interposed to its sufficiency. The judgment appealed from is reversed, and the cause remanded,

with instructions to reinstate the case and overrule the demurrer.

MOUNT, C. J., ROOT, CROW, DUNBAR, and HADLEY, JJ., concur.

RUDKIN, J. (dissenting)—I dissent. I do not think that the instrument described in the information in this case is a thing of value, for the want of a payee. It was so held in *Rex v. Richards,* Russ. & Ryan, 192, and *Rex v. Randall,* Id., 195. See, also: *Rex v. Pateman,* Id., 454; *People v. Galloway,* 17 Wend. 540; *In re Payson,* 23 Kan. 757; 12 Am. & Eng. Ency. Law (2d ed.), 834; Daniels, Neg. Inst. (5th ed.), § 102; Wharton, Crim. Law (10th ed.), § 1196. The rule announced by these authorities is not affected in any way by the provisions of the act regulating negotiable instruments in this state. Section 14 of that act provides that:

"Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount." Laws 1899, p. 343.

But this statute is simply declaratory of the common law or law merchant, as theretofore administered in the courts of England and the United States. Such was the law in the jurisdictions where the above cited cases were decided. Daniels, Negotiable Instruments (5th ed.), §§ 142, 143. Before a prosecution for forgery or obtaining money under false pretenses can be sustained on an instrument of this kind, it must appear that the instrument is sufficient on its face to charge some person; in other words, it must require extrinsic evidence to show its invalidity. *People v. Galloway, supra;* Wharton, Crim. Law, § 680.

In my opinion, the instrument described in this information is a nullity, a contract with but one party thereto, a

promise to pay no one. Without discussing the other objections urged against the information, the judgment should be affirmed.

[No. 6048. Decided January 22, 1906.]

LOUIS LAMERE, *Appellant,* v. EVA M. LAMERE, *Respondent.*[1]

DIVORCE—ABANDONMENT—FINDINGS—EVIDENCE. It is error to refuse a divorce on the ground of abandonment, where it appears that the wife left her home without any cause or excuse, and where she later declined absolutely to return home, both upon requests by the husband, by letter, and by her sister, who visited her at her husband's request, and where there was no evidence of collusion.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered December 11, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action for a divorce. Reversed.

Richardson, Roche & Onstine, for appellant.

PER CURIAM.—The plaintiff brought this action to procure a divorce from the defendant, on the ground of abandonment. The complaint is in the usual form in such cases. The action was brought in Spokane county, where the plaintiff has resided for more than twenty years. The defendant was personally served with process at Northport, in Stevens county, where she has resided since she ceased to live with the plaintiff. The defendant made no appearance, and the prosecuting attorney of Spokane county appeared at the hearing and resisted the complaint on behalf of the state. The divorce was denied, and the plaintiff appeals.

No appearance has been entered in this court by the respondent, or on behalf of the state. The facts, as disclosed by

[1]Reported in 84 Pac. 26.

the testimony, are substantially these: The appellant and the respondent intermarried in Spokane county, on October 15, 1893, and continued to live together as husband and wife, at Medical Lake in said county, until the 10th day of September, 1904, something more than a year prior to the commencement of this action. On the latter date the respondent left her home at Medical Lake, with the ostensible purpose of visiting her sister at South Bend, the appellant accompanying her to the train. Not having heard from the respondent, the appellant, some two or three weeks thereafter, wrote to his brother-in-law at South Bend and made inquiry as to the whereabouts of his wife. The brother-in-law replied that the respondent had not been at South Bend, but was residing at Northport, in Stevens county.

Thereafter the appellant wrote the respondent two letters to Northport, asking her to return to him, and received three letters in reply. The appellant also caused the sister of the respondent to visit her at Northport with a view of inducing her to return to her home; but this she declined absolutely to do. The testimony discloses not the slightest excuse or justification for the respondent's conduct. We judge from the findings and decree of the court that the divorce was refused because the letters passing between the appellant and the respondent were not produced in court, because the appellant did not go in person to Northport to procure the return of his erring spouse, and because there was collusion between the parties.

The appellant testified that the letters received from the respondent were in his possession at home, but that he did not bring them into court because he deemed them of no importance. He was not asked to produce the letters by either the court or the prosecuting attorney, and it was error to deny the divorce on that ground. There was not the slightest testimony of collusion between the parties, unless collusion be inferred from the fact that the appellant failed to go to Northport to induce his wife to return to her home. The

testimony shows that the respondent was keeping a private boarding house at Northport for two men, one of whom formerly lived at Medical Lake. We are not called upon to say that the relations between the respondent and this man were improper, but she declared that she thought more of him than of her husband, that the latter might get a divorce from her, and that she would never return to him. The wife left her home without cause or excuse. The husband asked her to return, by letter, and sent her sister after her, but without avail. More than this, in our opinion, the law does not demand of the innocent party.

The judgment is reversed, with directions to grant the divorce as prayed, and make such disposition of the property rights of the parties as law and equity demand. Inasmuch as the respondent made no appearance in the court below or in this court, no costs will be allowed on this appeal.

[No. 5891. Decided January 23, 1906.]

ORTHO DORMAN *et al., Appellants,* v. L. PLOWMAN *et al., Respondents.*[1]

LANDLORD AND TENANT—LEASES—FOR TERM OF YEARS, WITHOUT ACKNOWLEDGEMENT—TERMINATION. An unacknowledged lease for a term of years, with yearly rent reserved, is terminable upon thirty days notice preceding the end of the period at which the rent was payable, under Bal. Code, § 4568, providing that unacknowledged leases are valid for a period not exceeding one year, and under Bal. Code, § 4569, providing that premises leased for an indefinite term with periodic rent reserved shall be construed to be a tenancy from period to period.

SAME—EQUITIES OF TENANT—CONSIDERATION FOR LEASE. A tenant under an unacknowledged lease cannot claim any equitable rights from the fact of a purchase of cattle from the landlord where the purchase formed no part of the consideration for the lease.

[1]Reported in 83 Pac. 322.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered June 7, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

Gallagher & Thayer, for appellants.

J. N. Pickrell, for respondents.

FULLERTON, J.—On December 24, 1903, the respondents L. Plowman and Jennie M. Plowman entered into a written lease with the appellants by the terms of which they leased to the appellants certain farm lands which they owned, for a term of four years, at a yearly rental of four hundred dollars. The lease was not acknowledged, and the respondents, treating it as a lease from year to year, served upon the appellants a written notice to quit and surrender the premises at the end of the first year thereof, viz., December 24, 1904. On that date, finding no one in the actual possession, the respondents re-entered, and subsequently sold the property to the respondents Pierce. This action was brought by the lessees to recover the possession for the remainder of the unexpired term. The trial court held the lease valid as a lease of the property for a period of one year, but invalid, because not acknowledged, as to the remainder of the term, and entered judgment for the lessors.

It is the contention of the appellants that a contract in writing purporting to convey or create an interest in, or incumbrance on, real property is valid under the statutes of this state although not acknowledged, whenever accompanied by part performance, such as payment of the consideration or a part thereof, or a voluntary delivery of possession under the terms of the contract. This court has held in a number of cases that contracts to convey land, or to create incumbrances thereon, were valid as between the parties where there had been a substantial part performance, although not

executed with the formalities required by statute, but we think these cases are distinguishable from the one at bar. They proceed on the theory that equity will relieve from the statute of frauds whenever the enforcement of the statute will enable the party seeking to enforce it to perpetrate a fraud upon the other party; while the statute itself has undertaken to define the rights of parties who have taken possession of property under a void or defectively executed lease, and paid rent for a given period only.

By statute it is expressly provided that leases, although in writing, are when without acknowledgment, valid for a period not exceeding one year. Bal. Code, § 4568. And, also, that when premises are rented for an indefinite time, with monthly or other peridoic rent reserved, such tenancy shall be construed from month to month or from period to period, according to which such rent is payable, and that such a lease may be terminated by either party by written notice given thirty days or more preceding the end of any such month or period. Bal. Code, § 4569.

The first of these sections is capable of different constructions; it may mean that an unacknowledged lease for a term longer than one year is valid as a lease for one year only, or it may mean that such a lease, being for a prohibited period, is void from its inception. But whichever of these may be the true construction, it is not necessary to determine here, as either reaches the same result. If the first be adopted, there can be no further question as to the correctness of the judgment, since the lease expired by its own terms on December 24, 1904, and the respondents had the right of re-entry on that day, and did no more than exercise that right when they took possession and ousted the appellants. On the other hand, if the second construction is to be adopted, the second section of the statute above cited governs. That section would make the lease one for an indefinite time, with periodic rent reserved, and hence terminable at the option of either party by notice given thirty days preceding the end of

any one of such periods. *Watkins v. Balch, ante* p. 310, 83 Pac. 321. Therefore, by entering and paying rent for one year, the appellants did not acquire a right to the full term. The lease was terminable by either party at the end of any year, and was terminated by the written notice given by the respondents.

The further contention, namely, that the appellants are entitled to equitable relief because they purchased of the respondents a band of cattle as a part consideration of the lease, we think is founded on a mistaken view of the evidence. The appellants did purchase of the respondents a band of cattle, but we think the view of the trial court that this purchase formed no part of the consideration for the lease is the true one.

The judgment is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, and ROOT, JJ., concur.

[No. 5994. Decided January 23, 1906.]

D. W. R. DAVIS, *Respondent,* v. GEO. W. EDWARDS *et al., Appellants.*[1]

APPEAL—JURISDICTION—APPEALABLE ORDERS—ORDER REFUSING TO VACATE APPOINTMENT OF RECEIVER. An order denying a motion to vacate the appointment of a receiver is an appealable order.

RECEIVERS — FOR INSOLVENT CORPORATION — APPOINTMENT AT INSTANCE OF SIMPLE CONTRACT CREDITOR. A receiver may be appointed for an insolvent corporation upon the suit of a simple contract creditor upon a showing of insolvency, and without any showing that judgment and execution would be a useless formality.

SAME—JURISDICTION TO APPOINT—WAIVER OF NOTICE OF APPLICATION BY DE FACTO PRESIDENT. The jurisdiction to appoint a receiver for an insolvent corporation upon the waiver of notice of the application by the president of the corporation, does not depend upon the consent of the president, nor upon the question whether the acting president had title to the office or authority to waive notice.

[1]Reported in 84 Pac. 22.

SAME—COLLUSION—EVIDENCE. The charge of collusion between the president and officers of a corporation, resulting in the appointment of a receiver, is not sustained by proof to the effect that they preferred the appointment of a receiver to the securing of liens and the sale of the property.

SAME—INSOLVENCY—FINDINGS—EVIDENCE—SUFFICIENCY. Findings of the trial court upon an application for the appointment of a receiver of an insolvent mining corporation, that the corporation was insolvent, will be sustained on appeal where the evidence is conflicting and proof of insolvency not convincing, and where the witnesses who had had the management and control of the corporation testified that it was insolvent, and none of the parties interested offered to pay the small claim for which the suit was brought.

Appeal from an order of the superior court for King county, Frater, J., entered August 5, 1905, after a hearing on an application of interveners, refusing to vacate an order appointing a receiver. Affirmed.

Walter H. Bond and *Leroy V. Newcomb (Bond & Babson,* of counsel), for appellants.

Brady & Gay and *Buchanan & Phillips,* for respondent.

RUDKIN, J. — Plaintiff brought this action to recover $192.50 for services performed by himself and his two minor sons for the defendant corporation. In addition to the prayer for a personal judgment, the complaint alleged that the defendant corporation was insolvent, and wholly unable to pay its just debts as they became due in the course of its business, and asked that a receiver be appointed. The defendant corporation, through its president, acknowledged service of the complaint and summons, entered an appearance in the action, and waived notice of the application for the appointment of the receiver. On the 14th day of July, 1905, the court made an order reciting the foregoing facts;

"And it appearing to the court from the said petition, and from the proofs offered, and from the admissions of the defendant in the open court, that the Consolidated Coal Company, a corporation, is insolvent and wholly unable to pay

its just debts as they become due in the course of its business; that it has stopped working at its mine; that it has ceased to be a going concern and that there are claims and debts outstanding against the company now due which it is unable to pay,"

a receiver was appointed as prayed. On the following day the appellants, as stockholders of the defendant corporation, were allowed to intervene in the action. A petition in intervention was accordingly filed, denying certain allegations of the complaint, especially the allegation of insolvency, and alleging a controversy between the interveners and certain officers and stockholders of the corporation, over the ownership and the right to vote certain corporate stock at a stockholders' meeting, a contest over certain offices in the corporation, and collusion between the plaintiff and the officers of the defendant corporation, resulting in the appointment of the receiver. The petition prayed that the order appointing the receiver be vacated and that the costs of the receivership be taxed to the president of the defendant corporation. A hearing was regularly had on the motion of the interveners to vacate the order appointing the receiver, and from the order denying the motion, this appeal was taken.

The respondent moves to dismiss the appeal for the reason that the order in question is not appealable, and that this court is therefore without jurisdiction. He contends that the statute allowing an appeal from an order removing or or refusing to change the personnel of the receiver, and not refusing to remove a receiver applies only to orders changing to orders discharging or refusing to discharge a receiver. This statute was construed otherwise by this court in *State ex rel. Tilton v. Superior Court*, 7 Wash. 74, 34 Pac. 431. In passing on this question the court said:

"The language of the statute is that an appeal will lie 'from an order appointing or removing or refusing to appoint or remove a receiver,' and, when superficially examined, would seem to justify the contention made by the relators. A more careful examination of the statute, however, leads us to

the conclusion that the legislature could never have intended to allow an appeal from an order made by a superior court removing a receiver for the purpose of appointing some person deemed more suitable in his place, nor from the order appointing such person to take such place. In our opinion, the legislature intended only to provide for appeals at the instance of the aggrieved party from a determination of the court as to the right to have a receiver to take charge of the corporation or estate in controversy."

The motion to dismiss is therefore denied.

The first contention of the appellants is that a court will not appoint a receiver at the instance of a simple contract creditor, unless it is manifest that the obtaining of a judgment and the return of an execution unsatisfied will be a useless formality. Whatever the rule may be in other jurisdictions, the rule is established in this state that a simple contract creditor, whose claim is not controverted, is entitled to a receivership against a debtor corporation upon a mere showing of insolvency. In *Oleson v. Bank of Tacoma,* 15 Wash. 148, 45 Pac. 734, the court said:

"Such being the provisions of our statute, it seems too clear for argument that the court of proper jurisdiction has a right to appoint a receiver, at the instance of any party interested, whenever it is made to appear to it that such corporation is insolvent, or has forfeited its corporate rights. No other conditions are imposed by the statute, and to import any other would be judicial legislation. Hence it must be held that it is the duty of the superior court of the proper county to appoint a receiver for an insolvent corporation whenever an interested party asks for such action on its part, and establishes the fact of such insolvency to the satisfaction of such court."

The next contention is that the petition for the appointment of the receiver does not sufficiently show insolvency. We will consider this question in connection with the affidavits filed in support of and against the motion to vacate.

It is next contended that the court was without jurisdiction because the president of the corporation had no authority

to consent to the appointment of the receiver, and because the person who accepted and waived service in this case was not, in fact, the president of the corporation. It is a sufficient answer to the first contention to say that the jurisdiction of the court to appoint the receiver did not rest on the consent of the president of the corporation. The court appointed the receiver after a full hearing. The president of the corporation simply waived notice of the application. An attorney for the company might have done this, and we know of no reason why the head of the corporation should not have equal authority. The person who appeared as president of the corporation was at least the acting president at the time, and the respondent was not required to look beyond this. The strife within the corporation did not concern him, and the title to an office could not be tried in this proceeding.

It is next contended that the receiver was appointed through collusion between the respondent and the officers of the defendant corporation. We do not think that the charge of collusion is sustained. The most that can be urged in support of this charge is that the president and other officers of the corporation preferred that a receiver be appointed rather than that a lien be filed and the property sold in that way. These officers were interested as stockholders and creditors, and the fact that they expressed such preference or recommended such a proceeding, in the event that the respondent was determined to sue, does not sustain a charge of collusion.

The only remaining question and the vital question in the case is the question of insolvency. The proof shows that the corporation was indebted to the amount of about $12,000, that it had no income and was not a going concern. On the other hand, its tangible assets consisted of 160 acres of coal land, a twenty-five year lease on an additional 160 acres, a right of way about three miles in length and personal property of from one to two thousand dollars in value. The leasehold interest was subject to forfeiture at any time for the non-

payment of rent. Some claim was made that several thousand dollars were due the corporation on stock subscriptions, but this was denied. One witness expressed the opinion that by the expenditure of from $50,000 to $60,000 the property of the corporation would or might be worth $1,000,000. Another witness estimated that there were 3,000,000 tons of coal underlying the two tracts of land, and that this was worth ten cents per ton in the ground.

On the other hand, witnesses who had the management and control of the corporation, and were familiar with its property and business, testified that it was insolvent. Considerable portions of the affidavits are devoted to charges and countercharges against officers and stockholders of the corporation, and have no bearing upon the merits of the case. After a careful consideration of all the proofs, we are not disposed to disturb the conclusion reached by the lower court that the corporation is insolvent. A satisfaction of the small demand in suit by any of the parties in interest would have demonstrated the solvency of the corporation, so far as any rights of the respondent are concerned.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5811. Decided January 29, 1906.]

S. C. FARNANDIS *et al., Respondents,* v. GREAT NORTHERN RAILWAY COMPANY *et al., Appellants.*[1]

ADJOINING LANDOWNERS—LATERAL SUPPORT—BLASTING—INJURY TO BUILDINGS — TUNNELING ADJACENT LAND — RECOVERY IRRESPECTIVE OF NEGLIGENCE. In an action for damages to buildings by the sinking and subsidence of the earth, caused by the construction of a railway tunnel in a city under lands adjacent to the plaintiff's buildings, recovery may be had without proof of negligence on the part of the railroad company in constructing the tunnel, when the damage was caused by the removal of the lateral support or the shaking of the earth by blasts and not by any increased downward or lateral pressure upon the soil by the buildings, in view of the constitutional provision that private property shall not be damaged without just compensation having been first made.

SAME—EVIDENCE—QUESTION FOR JURY. In an action for damages to buildings, the question whether the injury was caused by blasts and the removal of lateral support by the construction of a tunnel one hundred and twenty feet distant, is for the jury when the sinking and cracking of the earth was evidently not due to any increased or downward pressure upon the soil by the buildings.

SAME—MEASURE OF DAMAGES—LANDLORD AND TENANT—RESPONSIBILITY TO TENANT FOR REPAIRS. In an action by the lessees of buildings used for hotel and lodging purposes for damages by the removal of lateral support making the buildings unfit for occupancy, it is proper to instruct the jury to consider in determining the damages the uses to which the buildings were put.

SAME — REMOVAL OF LATERAL SUPPORT — TAPPING SUBTERRANEAN WATERS—DAMAGES FROM OPERATIONS IN PUBLIC STREETS. In an action for damages to premises by the removal of lateral support, it is no defense that the subsidence of the land was due to an excavation under a public street which tapped subterranean waters the withdrawal of which caused the subsidence of the land, the same rule applying as in the case of the damaging of property by the removal of earth in a public street.

SAME—MEASURE OF DAMAGES—USE OF BUILDINGS. In an action by the lessees of buildings, by them sublet to other tenants, for damages to the buildings by reason of the removal of lateral support, the measure of damages does not include any sum for the responsi-

[1]Reported in 84 Pac. 18.

bility of the plaintiffs to their tenants for want of repair, since the plaintiffs would not be liable to the subtenants without negligence or fault on their part.

TRIAL—ERRONEOUS STATEMENT OF LAW BY COUNSEL—CORRECTION. Where counsel argue the law to the jury incorrectly stating the same on material points, it is the duty of the court, upon a proper request, to correct the error by proper instructions.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 14, 1905, upon the verdict of a jury rendered in favor of the plaintiffs, in an action against railroad companies for damage to buildings caused by the construction of a tunnel. Reversed.

L. C. Gilman, for appellants, contended, among other things, that the abutting owner has, as against a city, no right to the lateral support of the soil of the street, and can acquire none from prescription or lapse of time. 2 Dillon, Municipal Corporations, § 991; *Quincy v. Jones,* 76 Ill. 231, 20 Am. Rep. 243; *Mitchell v. Mayor of Rome,* 49 Ga. 19, 15 Am. Rep. 669; *Mayor of Rome v. Omberg,* 28 Ga. 46, 73 Am. Dec. 748; *Radcliff's Ex'rs v. Mayor etc. of Brooklyn,* 4 N. Y. 195, 53 Am. Dec. 357; *Fellowes v. New Haven,* 44 Conn. 240, 26 Am. Rep. 447; *Delphi v. Evans,* 36 Ind. 90, 10 Am. Rep. 12; *Meares v. Com'rs of Wilmington,* 31 N. C. 73, 49 Am. Dec. 412; *Callender v. Marsh,* 1 Pick. 418; *Northern Transp. Co. v. Chicago,* 99 U. S. 635, 25 L. Ed. 336. Within the meaning of the provision of the constitution respecting damage to property, injury to buildings resulting from the removal of lateral support is *damnum absque injuria. Rigney v. Chicago,* 102 Ill. 64; *East St. Louis v. O'Flynn,* 119 Ill. 200, 10 N. E. 395, 59 Am. Rep. 795; *Metropolitan etc. R. Co. v. Goll,* 100 Ill. App. 323; *Davenport etc. R. Co. v. Sinnet,* 111 Ill. App. 75; *Pennsylvania R. Co. v. Lippincott,* 116 Pa. St. 472, 9 Atl. 871, 2 Am. St. 618; *Pennsylvania R. Co. v. Marchant,* 119 Pa. St. 541, 13 Atl. 690, 4 Am. St. 659; *Austin v. Augusta etc. R. Co.,* 108 Ga. 671, 34 S. E. 852; *Peel v. Atlanta,* 85 Ga. 138,

11 S. E. 582; *Van De Vere v. Kansas City,* 107 Mo. 83, 17 S. W. 695, 28 Am. St. 396; *Gaus & Sons Mfg. Co. v. St. Louis etc. R. Co.,* 113 Mo. 308, 20 S. W. 658, 35 Am. St. 706; *Rude v. St. Louis,* 93 Mo. 408, 6 S. W. 257; *Ruckert v. Grand Ave. R. Co.,* 163 Mo. 260, 63 S. W. 814; *Gilbert v. Greeley etc. R. Co.,* 13 Colo. 501, 22 Pac. 814; *Jordan v. Benwood,* 42 W. Va. 312, 26 S. E. 266, 57 Am. St. 859; *Adams v. Chicago etc. R. Co.,* 39 Minn. 286, 39 N. W. 629, 12 Am. St. 644; *Carroll v. Wisconsin etc. R. Co.,* 40 Minn. 168, 41 N. W. 661; *Hanlin v. Chicago etc. R. Co.,* 61 Wis. 515, 21 N. W. 623; *Rinard v. Burlington etc. R. Co.,* 66 Iowa 440, 23 N. W. 914; *Morgan v. Des Moines etc. R. Co.,* 64 Iowa, 589, 21 N. W. 96, 52 Am. Rep. 462. There can be no recovery for damage resulting from the tapping of an underground stream by excavations in a city street. Elliott, Roads and Streets (2d ed.), §§ 17, 407; *Elster v. Springfield,* 49 Ohio St. 82, 30 N. E. 274; *Morrison v. Bucksport etc. R. Co.,* 67 Maine 353. See, also, *Regina v. Metropolitan Board of Works,* 3 B. & S. 710, 32 L. J. Q. B. N. S. 105, L. R. 4 Q. B. 358. The landowner may make use of his property, and place improvements thereon, without regard to the effect upon subterranean waters. *Meyer v. Tacoma Light etc. Co.,* 8 Wash. 144, 35 Pac. 601; *Greenleaf v. Francis,* 18 Pick. 117; *Wheatley v. Baugh,* 25 Pa. St. 528, 64 Am. Dec. 721; *Haldeman v. Bruckart,* 45 Pa. St. 514, 84 Am. Dec. 511; *Bliss v. Greeley,* 45 N. Y. 671, 6 Am. Rep. 157; *Bloodgood v. Ayers,* 108 N. Y. 400, 15 N. E. 433, 2 Am. St. 443; *Chatfield v. Wilson,* 28 Vt. 49; *Roath v. Driscoll,* 20 Conn. 532; *Swett v. Cutts,* 50 N. H. 439, 9 Am. Rep. 276; *Buffum v. Harris,* 5 R. I. 243; *Hougan v. Milwaukee etc. R. Co.,* 35 Iowa 558, 14 Am. Rep. 502; *Herriman Irr. Co. v. Keel,* 25 Utah 96, 69 Pac. 719; *Southern Pacific R. Co. v. Dufour,* 95 Cal. 615, 30 Pac. 783; *Mosier v. Caldwell,* 7 Nev. 363; *Popplewell v. Hodkinson,* L. R. 4 Exch. 248; *Galgay v. Railway Co.,* 4 Ir. Cl. Rep. 456; *Acton v. Blundell,* 12 M. & W. 324; *New River Co.*

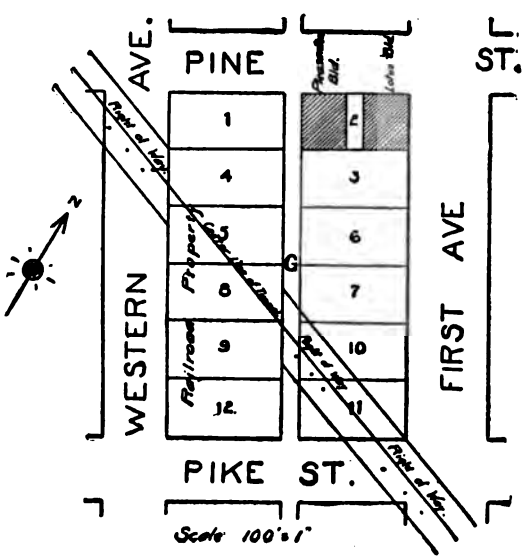
v. Johnson, 2 E. & E. Q. B. 435; *Smith v. Kendrick,* 7 C. B. 515, *Queen v. Metropolitan Board of Works,* 3 Best & Smith 708; *Chasemore v. Richards,* 7 H. L. Cases 349, 29 L. R. Ex. 81. When, for the purpose of lawfully making use of or improving land, it becomes necessary to resort to blasting as the only practicable method of doing so, the owner will not be liable for consequential damages to neighboring property unless he has failed to exercise due care in the performance of the work. 12 Am. & Eng. Ency. Law (2d ed.), 509; *Benner v. Atlantic Dredging Co.,* 134 N. Y. 156, 31 N. E. 328, 30 Am. St. 649; *Booth v. Rome etc. R. Co.,* 140 N. Y. 267, 35 N. E. 592, 37 Am. St. 552; *Murphy v. Lowell,* 128 Mass. 396, 35 Am. Rep. 381; *Simon v. Henry,* 62 N. J. L. 486, 41 Atl. 692. A landlord is not responsible to his tenant for the act of a third party causing the tenant injury, so that if the injuries to these buildings were caused by any act of these defendants, the plaintiffs would not be liable to their tenants therefor. 18 Am. & Eng. Ency. Law (2d ed.), 625, 626, and cases cited; Taylor, Landlord & Tenant (7th ed.), §§ 304, 305; *Surget v. Arighi,* 11 S. & M. (Miss.) 87, 49 Am. Dec. 46; *Branger v. Manciet,* 30 Cal. 625; *Schilling v. Holmes,* 23 Cal. 227; *Kimball v. Grand Lodge,* 131 Mass. 59; *Schuylkill etc. R. Co. v. Schmoele,* 57 Pa. St. 271; *Moore v. Weber,* 71 Pa. St. 429, 10 Am. Rep. 708; *Barnes v. Wilson,* 116 Pa. St. 303, 9 Atl. 437.

McCafferty & Bell, A. Jurich, and *Allen, Allen & Stratton,* for respondents.

MOUNT, C. J.—The respondents are the owners of a ground lease of lot 2 in block 6 of Denny's Fourth addition to Seattle. They have erected and own two brick buildings thereon, which buildings are leased and used for lodging and hotel purposes. One of these buildings is known as the "Lotus" building, and the other as the "Pleasanton" building. The respondents Farnandis and wife and Hamm own the whole of the Pleasanton building and an undivided one-half of the

Lotus building. The respondents Morris and wife own an undivided half of the Lotus building. In the years 1903 and 1904, the appellant railway companies constructed a tunnel underneath said city of Seattle, for use for railway purposes. This tunnel is about one mile in length and of varying depth from the surface. It was constructed in part under property belonging to the said railway companies, in part under private property through which an easement had been acquired, and in part under streets and alleys of the city, a franchise having been granted by the city permitting the same to be done. The tunnel in its course passes within about one hundred and twenty feet of lot 2 whereon respondents' buildings are situated.

The following is a sketch showing the relation of respondents' property to the tunnel; also showing the position of the tunnel in this vicinity constructed under a public street, the portion under the property of the railway companies, and the portion under property through which said companies have an easement.



The surface of the ground on which respondents' buildings stand is some higher than the surface over the tunnel, the land between the building and the tunnel being a sidehill. Respondents' buildings had been constructed for about two years prior to the time the tunnel was constructed, and were in a solid and substantial condition until the time of the construction of the tunnel. When the tunnel was being constructed in the immediate vicinity of the buildings, it became necessary to use large charges of dynamite and giant powder to blast out the rock and gravel deposits in the tunnel. These blasts caused the buildings to shake so that occupants would not remain therein. Large cracks also opened up in the earth between the tunnel and the buildings, and caused the buildings to crack. A settling of the earth caused a partial collapse of the buildings and much damage thereto.

Separate actions were instituted by respondents against appellants. Respondents Farnandis and wife and Hamm alleged in their complaint that the construction of the tunnel through and under the property adjacent to the said buildings caused the earth to sink, settle, and subside, and thus occasioned the settlement and partial collapse of the buildings. They allege damages in the sum of $20,000. The respondents Morris and wife alleged in their complaint that, by reason of the manner of construction of the tunnel, the lot was caused to settle and sink and the buildings caused to partially collapse, to their damage in the sum of $10,000. The answer to each of these complaints was a general denial. By the consent of all the parties, the two causes were consolidated and tried together, to the court and a jury. A verdict was returned in favor of Farnandis and wife and Hamm for $7,175, and in favor of Morris and wife for $3,675. The railway companies have appealed from a judgment entered upon the verdict.

The first question presented in the briefs is whether or not, under the pleadings and the evidence, the respondents were entitled to recover damages to their buildings, occasioned by

the excavation made by appellants in the land adjacent to that whereon the buildings were located. No negligence was claimed against the appellants, either in the pleadings or the evidence, respondents' position being that, if the excavation made by appellants in their own land or in the lands whereon they had a license to make excavations, were made in such a manner as to cause a subsidence of the soil of respondents' lands, whereby the buildings were caused to settle and crack and be injured, the appellants were liable, notwithstanding their work had been performed in the most careful and prudent manner. This contention was sustained by the trial court, and evidence was received and the jury were instructed upon that theory. Appellants cite numerous authorities to the point that the right to lateral support applies only to the land itself, and not to buildings or other artificial structures thereon, and the weight of authority seems to be that where one person excavates on his own land in a careful and prudent manner, he is not liable for consequential damages accruing to his neighbor. But this rule is modified to this extent:

". . . that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away by its own weight and fall upon his land. But this right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward or lateral pressure. If it did, it would put it in the power of a lot-owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter." *Transportation Co. v. Chicago,* 99 U. S. 635, 25 L. Ed. 336.

The rule is firmly established that,

"Every owner of real estate is entitled to have the soil preserved and supported in its natural condition, and the privileges of adjoining owners are so far limited that they may not so excavate or otherwise change the position of their

land as to leave that of their neighbor less firmly supported." 1 Am. & Eng. Ency. Law (2d ed.), 229.

See, also, *Larson v. Metropolitan St. R. Co.*, 110 Mo. 234, 19 S. W. 416, 33 Am. St. 439 and note. "Nor is his liability in any wise dependent upon the degree of skill or care which he exercises." Monographic note to *Larson v. Metropolitan St. R. Co.*, 33 Am. St. 450. See, also, *Baltimore etc. R. Co. v. Reaney*, 42 Md. 117; *Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631, 47 Am. St. 630; *Gilmore v. Driscoll*, 122 Mass. 199, 23 Am. Rep. 312. In order that these rules may stand together and not be inconsistent, it must follow that, when soil is removed from its natural position by one owner and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but is a direct injury.

In the case of *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. 839, 20 L. R. A. 68, this court held that the city was liable for damages caused by grading the street, whereby lands abutting on the street were deprived of their lateral support. In the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, which was a case where an order was made restraining the city from grading a street in front of Mrs. Brown's property until the damage which would be caused by such grade was first ascertained and paid, this court held an injunction was proper, and in the opinion said:

"But the main question is, admitting the fact of injury, would the respondent be entitled to compensation from the city? Previous to the adoption of the constitution she would have been without remedy, excepting for such injury as might have occurred to her land alone, arising from the withdrawal of support and its consequent actual falling in, or from the negligence of the city in doing the work. . . . But the constitution of this state (art. 1, § 16) provides that no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and it is upon this prohibition that

the respondent bases her right to an injunction. The earlier constitutions of the several states in the Union contained, with but few exceptions, a provision that private property should not be taken for public use without just compensation. . . . After almost twenty years of discussion and decision in Illinois and other states, we put the words 'taken or damaged' into our constitution, and they must have their effect. . . . It is now too late to urge this argument [i. e. the word 'damage' gave no additional or greater security to the appropriator for public use] against the recovery of such damages as are threatened to be caused by the action of the city of Seattle here in question. Every court in which the point has been raised has decided in favor of the private citizen; but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit, the public should make good the loss to the individual. Such always was the equity of the case, and the constitution makes the hitherto disregarded equity now the law of it."

In the case of *Peters v. Lewis*, 33 Wash. 617, 74 Pac. 815, which was an action for damages by reason of drainage from defendants' adjoining premises, this court held that a counterclaim alleging that plaintiff had removed the earth abutting upon the line of its lot, thereby leaving the lot without its natural lateral support, which caused defendants' land to slide and the foundations of their houses to become weakened, and destroyed the natural surface of the ground, was proper matter for counterclaim. And in the case of *Smith v. St. Paul etc. R. Co.*, 39 Wash. 355, 81 Pac. 840, which was carefully considered by this court after two separate arguments had been permitted and many authorities cited upon the constitutional questions involved here, we held that a property owner may recover damages resulting from the operation of railway trains which jar the earth and otherwise physically disturb the property. It was said in that case:

"If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical

conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of the neighboring property entails thereupon."

These cases are decided upon the theory that the act complained of is an interference with the rights of property, and that the damage is direct and not merely consequential.

The effect of our decisions, as above stated, is to hold that for a physical injury or direct invasion of property rights, damages are recoverable under the provisions of the constitution that "no private property shall be taken or damaged for a public or private use without just compensation having been first made." It follows, of course, that the liability does not depend upon the degree of care or skill used to prevent damage. The question whether the damage to the buildings situated one hundred and twenty feet away from the nearest point of appellants' tunnel was caused by the removal of the lateral support of the soil or by shaking the earth by blasts was a question for the jury. But in either event the liability of the appellants was the same whether the damage was caused with or without negligence. The sinking and cracking of the earth was evidently not due to any increased downward or lateral pressure upon the soil by the buildings, because the cracks and sinking appeared between the buildings and the tunnel and extended through the buildings. If the weight of the buildings did not in any wise contribute to the sinking or cracking of the earth, then the removal of the earth was the direct cause of the damage both to the land and to the buildings. To hold under such circumstances that appellants would be liable only for the damage to the land, and not to the buildings, would be to follow the shadow of the old rule and to disregard the substance of it and the reason upon which it was based.

Appellants complain that the court erred in giving the following instruction:

"In determining what damages, if any, should be assessed to the plaintiffs by reason of the injuries to the land, if any were caused by the construction of the tunnel, you have a right to consider the use to which said land was put by the plaintiffs, and what damage, if any, the plaintiffs, S. C. Farnandis and R. H. Hamm in the one case, and Antone Morris and Perina Morris in the other case, will sustain thereby during their leasehold interest in the property."

It is claimed that this instruction permitted the jury to assess damages that were personal to the plaintiffs. We do not so construe the instruction, when read in connection with the other instructions. Just preceding this instruction the court instructed as to the elements of damage they might consider in reference to the buildings. There were two subjects of damage, viz., the land itself and the buildings, either or both of which may have been recovered for according to the injury. The use to which the land was adapted was proper to be considered in determining the value of the land and the damages sustained. *Seattle etc. R. Co. v. Roeder,* 30 Wash. 244, 70 Pac. 498. This instruction is not subject, we think, to the criticism made by the appellants.

There was some evidence to the effect that the cracks in the earth and the settling thereof might have been caused by the tapping of an underground stream or subterranean flow of water which caused the soil to be carried away. Appellants requested the court to give the following instruction:

"I charge you that, if you find from the evidence in this case that the cause of the injuries to plaintiffs' property, if you find the same was injured, was the tapping of an underground stream or stratum by the boring of the tunnel into the earth, and that such underground stream or stratum so tapped ran out, causing a subsidence of the soil on which plaintiffs' buildings stand, then the defendants would be under no liability for the damages so caused, and plaintiffs would have no right to recover therefor, and if you do so find, your verdict must be for the defendants."

The court gave this instruction, but modified it by adding the following:

"However, for this instruction to apply you must believe that the percolating or subterranean waters withdrawn were upon the railway company's own property. It would not apply if such water was withdrawn from underneath or below or in a public street or in property which was not the property of said railway company;"

thus, in effect, telling the jury that, while the appellants might have caused damage to the property without liability therefor, by tapping the subterranean flow of water on their own land, yet the easement in a public street did not authorize such damage without compensation. This modification was made by the court upon the theory that the city could grant no greater right than it possessed; and since the city would be liable for damage caused by removing the lateral support under the rule in *Parke v. Seattle* and *Brown v. Seattle, supra,* therefore the corporation using the street for private gain by authority of the city would be liable in the same way.

While many authorities are cited by the appellants to the effect that the rights of a municipality in its streets are not inferior to the authority of a private owner over his own land, we think the rule, as recognized and laid down by this court in the cases hereinbefore cited, under our constitution, is conclusive of the question that private property shall not be damaged for a public use without just compensation. It is true that the word "damaged" has been held to mean such damages as were recoverable at common law between individuals; but in view of the rule that the carrying away of land by its own weight is not consequential damage, but is an actual infringement and taking of property, we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual taking and a resulting damage. Under statutes which are in substance the same as our constitutional provisions, the courts of Massachusetts have held, where the land of an adjacent owner is taken away by an

excavation on other lands, which excavation taps a subterranean stream of quicksand and water, permitting the soil of an adjoining owner to crack, that the parties making such excavation were liable for the damage. *Cabot v. Kingman,* 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45. It was said in that case:

"Whatever may be true of percolating waters, we think that the defendants had no right to take away the soil of the plaintiff in land which they had not taken under the statutes, and that it is immaterial that the soil was removed by means of pumps from the trench into which it had fallen by its own weight, or had been carried by percolating water. We are unable to distinguish the case from one where the soil falls in from the surface in consequence of an excavation in the adjoining land."

See, also, *Trowbridge v. Brookline,* 144 Mass. 139, 10 N. E. 796; *Marsden v. Cambridge,* 114 Mass. 490; *Lincoln v. Commonwealth,* 164 Mass. 368, 41 N. E. 489. Under this view, which we think is the correct one, it was not error prejudicial against appellants for the court to give the modification complained of.

The points made in appellants' brief, relating to the motion for a new trial and the instruction relating to the blast where no negligence is charged, are both disposed of by what we have said in connection with the points above discussed, and need not be further noticed.

It appears from the record that one of respondents' counsel, in arguing the question of damages to the jury, stated that respondents occupied to their tenants the relation of landlords, and in the event of the buildings getting out of order or condition, that the tenants would have a right of action against them; whereupon the following occurred:

"Mr. Gilman: I desire an exception. The counsel has no right to argue the law to the jury. Mr. Allen: Of course I have. Now, gentlemen, let him take an exception. I will repeat it, and if he can get an exception out of it, let him take it,—that Mr. Hamm and Mr. Farnandis and Mr. Morris

stand in the relation of landlords to these people, and in that we are responsible to them for the building getting out of repair and getting in bad repair, and that they have a right of action against them for that, if they choose to exercise it, and Mr. Gilman knows it."

At the close of the arguments, appellants' counsel orally requested the court to charge the jury:

"That Mr. Farnandis and his associates have a certain interest in the buildings and the property; if that has been damaged by the railroad company the railroad company must pay for it. The tenants have a certain interest in the buildings. Mr. Farnandis is not responsible if the interest is affected and damaged by the railroad companies."

The request was refused and an exception allowed. The fact that the requested instruction was not in writing was waived by both the court and the counsel for respondents, and leave granted to appellants to reduce the request to writing, which was done after the jury had retired. In view of what had taken place between opposing counsel, it was clearly the duty of the court to give the instruction as requested. Upon the argument, respondents' counsel stated the measure of damages erroneously to the jury. The plaintiffs were clearly not liable to their subtenants for injuries to such tenants by the rairoad companies without negligence or fault on the part of the plaintiffs, and when the court said nothing about the point in his instructions, and refused to correct the erroneous impression so forcibly and repeatedly stated, the jury were at liberty to believe that the statements of the respondents' counsel were correct, and to assess damages against the defendants for such items.

The plaintiffs themselves were tenants of the property under a long lease. If they as tenants were entitled to recover for the injuries alleged, their subtenants for the same reason had the same rights for any substantial injuries done them. Clearly the plaintiffs were not liable to their subtenants for injuries done by third parties over whom the plaintiffs had no control. Counsel for respondents contend that

they have a right to argue the law to the jury. Conceding that they have, they must state it correctly, and when they make statements of law which are incorrect, it becomes the duty of the trial judge to correct them; especially, upon material points when a proper request is made therefor. Other statements were made in the argument of the case which were outside the record and should not have been made, but which we do not deem of sufficient importance of themselves to warrant a reversal, and since they will probably not occur upon a new trial, we shall not discuss them. Since the judgment must be reversed for the error above stated, it is unnecessary to discuss the errors alleged as to the amount of the verdict.

The judgment appealed from is reversed, and a new trial ordered.

ROOT, DUNBAR, FULLERTON, HADLEY, RUDKIN, and CROW, JJ., concur.

[No. 6044. Decided January 29, 1906.]

J. W. COUGHLIN, *Appellant,* v. ROBERT A. PINKERTON *et al.*, *Respondents.*[1]

PROCESS—SUMMONS—SERVICE UPON AGENT—ACTION AGAINST NONRESIDENT CO-PARTNERSHIP. Bal. Code, § 4875, subds. 8 and 9, providing for the method of service of a summons upon a company or association, has no application to a copartnership, and hence a service upon the resident agent of a nonresident copartnership is not authorized.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered October 30, 1905, upon motion of the defendants, quashing the service of summons. Affirmed.

W. T. Stoll, for appellant.

Sullivan, Nuzum & Nuzum, for respondents.

[1]Reported in 84 Pac. 14.

Crow, J.—Appellant J. W. Coughlin instituted this action in the superior court of Spokane county, against respondents Robert A. Pinkerton and William A. Pinkerton, to recover damages claimed to have been sustained by defamation of character. The complaint alleges that respondents are partners, under the firm name of the Pinkerton National Detective Agency, engaged in the occupation of detecting criminals, ferreting out crimes, and doing other detective work, with offices and officers in most, if not all, the principal cities of the United States, and with an office in the city of Spokane in this state, which is managed and conducted by one E. K. Tabor, as superintendent, managing agent, and cashier.

Summons and complaint were personally served upon said E. K. Tabor, as respondents' resident agent. Thereupon respondents appeared specially, moved to quash said service, and in support of their motion, presented the affidavit of said Tabor, in which he alleges, that he is the superintendent and managing agent of respondents and of their principal office in Spokane; that said respondents are copartners, and were such at all times in said affidavit mentioned; that said Robert A. Pinkerton resides in the city of New York, in the state of New York; that said William A. Pinkerton resides in the city of Chicago, in the state of Illinois; that summons and complaint in this action were delivered to said Tabor at Spokane, Washington, on June 10, 1905; that at said time and for some time prior thereto, said respondents were not, nor was either of them, within the state of Washington, and that neither of them had been served with a copy of the summons or complaint in the action.

On the hearing of said motion, respondents contended (1) that a service of summons on a partnership firm, or on any member thereof, is not authorized by any statute of this state to be made by service upon any agent of said partnership, and that the words "company" and "association," which appear in subdivisions 8 and 9, of § 4875, Bal. Code, and are relied upon by appellant, cannot be held to include a partner-

ship; (2) that if said words be held to intend or include a partnership, then said section, when so construed, deprives respondents of property without due process of law, and is unconstitutional. The trial judge sustained these contentions, and quashed the service. From said order this appeal has been taken.

Appellant insists, (1) that the word "company," as used in subdivision 8, and the word "association," as used in subdivision 9, of said § 4875, Bal. Code, which is § 7 of our practice act of 1893, were intended to include a partnership, and that a nonresident partnership doing business in this state may be served by the delivery of summons and complaint to its secretary, cashier, or managing agent; (2) that a statute providing for such service upon a nonresident partnership doing business in this state is not unconstitutional or void, but confers jurisdiction upon the courts of this state to enter a personal judgment against such partnership, and all the individual members thereof.

Many of the courts, under certain circumstances, have held the words "company" and "association" to sometimes include or apply to partnerships; and again these terms have been frequently distinguished. They certainly are not synonymous, nor are they identical in their meaning, whether used in legal or ordinary phraseology. These variations in construction arise from the different circumstances or contexts in which these words appear or find use. Because the word "company" may frequently, and the word "association" may occasionally, be applied to or include a partnership, it does not necessarily follow that they must always be so understood or construed. Their use in subdivisions 8 and 9 of § 4875, *supra,* must be interpreted with a view to their contexts, and consistently with other provisions of our practice act, ch. 187, Laws 1893, p. 407 *et seq.* Section 13 of said act, being § 4881, Bal. Code. reads as follows:

"When the action is against two or more defendants and the summons is served on one or more but not on all of them,

the plaintiff may proceed as follows: (1) If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served; . ."

Construing subdivision 1 of said section, this court, in *Livingstone v. Lovgren,* 27 Wash. 102, 67 Pac. 599, held that, when service had been made upon one member of a partnership only, a judgment arising upon contract, which provided that the judgment creditor might recover from all of the defendants constituting said firm the sum adjudged to be due, and that said judgment might be satisfied out of the joint property of all of the defendants constituting said partnership firm, or out of the separate property of the one defendant served, was a proper judgment and could be enforced as such. In writing the opinion, White, J., suggested that the question as to whether such a judgment was void in so far as it determined that the amount due the judgment creditor might be satisfied out of the joint property of the partnership, depended upon the further question whether said action was based on contract or was an action in tort. Holding said action to have arisen on contract, he for that reason sustained said judgment. His argument carried with it the clear implication that, had the action arisen in tort, the judgment would have been invalid for any purpose whatever, except as a personal judgment against the individual partner who had been personally served with process within this state.

This is an action in tort, and it would be inconsistent for us to hold, under § 4881, that a partner not served could not be held personally liable on a judgment against the partnership when another member of the firm had been served, and at the same time hold, under subdivisions 8 and 9, § 4875, that all members of such firm could be held to such a liability when their agents only, and not a partner, had been served.

In other words, this would in effect be a holding that service upon a mere agent would be better, more potential, and confer greater jurisdictional powers upon the court, than if made upon an individual member of the firm. Sections 4875 and 4881 are both a part of the general practice act of 1893. The legislature certainly could not have intended by these two sections of one and the same act to provide in one instance that service on a mere agent should authorize the entry of a valid personal judgment against all the individuals who composed the partnership, while in the other instance service on an individual partner should authorize personal judgment against him only, and not against any of his copartners not personally served.

The pretended service shown by the record is not warranted by the provisions of said § 4875, *supra*. In view of the above suggestions, it is not necessary for us to discuss the constitutional question raised in the briefs. The judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, FULLERTON, HADLEY, and RUDKIN, JJ., concur.

[No. 5969. Decided January 29, 1906.]

JOHN F. MAIN, *as Administrator etc. of William Urquhart, Deceased, Respondent,* v. CHARLES HADFIELD, *Appellant.*[1]

EXECUTORS AND ADMINISTRATORS — DISCOVERY — EXAMINATION OF PARTY SUSPECTED OF CONCEALING PROPERTY OF ESTATE—PROCEDURE—STATUTE—CONSTRUCTION. Under Bal. Code, §§ 6212, 6213, providing for the citation, and examination under oath, before the court, of persons suspected of having property belonging to an estate, and for their commitment, on failure to answer, the provision that all interrogatories shall be in writing and signed by the party examined does not require that interrogatories be prepared *in toto* before the hearing, but the court may require the matter to proceed summarily by questions reduced to writing and answered in writing in the presence of the court (FULLERTON, J., dissenting).

[1]Reported in 84 Pac. 12.

Appeal from an order of the superior court for King county, Frater, J., entered July 1, 1905, in favor of an administrator, requiring the defendant to answer interrogatories touching property of the estate alleged to be in his possession, and committing him to jail for refusal to answer. Affirmed.

H. E. Peck, for appellant.

J. P. Wall and *Graves, Palmer, Brown & Murphy,* for respondent.

DUNBAR, J.—This is an appeal from an order of the judge of the superior court of King county, requiring appellant to answer interrogatories in a special proceeding, and from an order committing him to jail until such interrogatories were answered. Citation was issued by John F. Main, as administrator of the estate of William Urquhart, deceased, to appellant, requiring him to disclose what he knew of the property belonging to the estate of the said William Urquhart. The citation was issued under Bal. Code, §§ 6212 and 6213. Section 6212 provides that,

"If the executor, administrator, heir, legatee, creditor or other person interested in the estate of any deceased person shall complain to the court on oath that any person is suspected of having concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the deceased, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidence of or tend to disclose the right, title, interest, or claim of the deceased to any real or personal estate, or any claim, demand or last will of the deceased, the said court may cite such person to appear and may examine him on oath on the matter of such complaint," etc.

Section 6213 provides that, "if the person so cited refuse to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may, by warrant for that purpose, commit him to the county jail," etc., and all such interroga-

any more than the statute accords him, and it does not accord him, in terms or by necessary implication, the right to a formal procedure in such a case. Such rights he is entitled to afterwards when the action is brought against him, if it is brought.

As further conveying the idea that it is an examination before the court, the latter part of § 6212 provides: "If such person be not in the county where letters have been granted, he may be cited and examined, either before the court for the county where he may be found, or before the court issuing the order or citation." The idea seems to prevail throughout that this is to be a summary examination, and not a case where issues are formed and tried. The same formal provisions are not provided for in this chapter as are provided for in the chapter in relation to the examination of parties to an action. Section 6008 provides that a party to an action or proceeding may be examined as a witness at the instance of the adverse party. Section 6009 provides that, instead of the examination being had at the trial, interrogatories may be filed for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party. And § 6010 provides that such interrogatories shall be served in the manner provided by law for the service of summons, or by service upon the attorney of the party to be interrogated, and the answers thereto shall be served and filed within twenty days after such service, unless for cause shown further time be allowed by the court.

These two statutes, in regard to the examination of adverse parties as witnesses and to the examination of parties thought to have possession of the property of an estate, were both passed by the first session of the legislature of this state, in 1854, and incorporated into the code in that section, and have been brought forward from that day until this; showing that the legislature at the session of 1854 had in mind two different processes for obtaining summary information from witnesses, one providing for the preparation of the interrogatories and

formal and legal notice thereof, and the other for the examination before the court with the simple provision that the questions and answers should be in writing and filed in the court. There was no objection in this case to the party having the benefit of the presence and advice of counsel, the contention being, as we have seen, that all the interrogatories should be prepared in advance before any answers were made to them.

We think the court properly construed the statute, and its judgment will therefore be affirmed.

MOUNT, C. J., CROW, ROOT, HADLEY, and RUDKIN, JJ., concur.

FULLERTON, J., dissents.

[No. 5807. Decided January 30, 1906.]

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42 234

MARTHA K. ERICKSON, *Respondent*, v. E. J. McNEELEY & COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—UNGUARDED SAW. Under the provisions of the factory act, an employee does not assume the risk of injury from an unguarded saw, if it could have been properly guarded, in which case the master is guilty of negligence as a matter of law.

SAME—POSSIBILITY OF GUARDING SAW—QUESTION FOR JURY. It is for the jury to determine whether a saw could have been properly guarded where witnesses testified that a proper guard could have been placed over or at the side of the saw at slight expense without any inconvenience or detriment to the operation of the saw, although this was disputed by other witnesses.

SAME—WORKING WITH BACK TO SAW—CONTRIBUTORY NEGLIGENCE. A power bolter's helper whose duty it is to place shingle blocks on the saw carriage, is not guilty of contributory negligence as a matter of law, by reason of his turning his back to the saw, striking his hook into a block weighing 75 to 100 pounds, and pulling with sufficient force to pull out the hook and fall backward into the saw, where there was evidence to the effect that the working space was

[1]Reported in 84 Pac. 3.

filled up with blocks, that it was the customary way of placing blocks on the carriage, and necessary to have his back to the saw under the circumstances.

EVIDENCE—PROOF OF GUARDING SAW AFTER ACCIDENT—WHEN ADMISSIBLE. Upon an issue as to whether a saw could have been advantageously guarded under the factory act, it is not error to admit evidence that after the accident it was guarded, where the evidence was offered only for the purpose of showing that the saw could have been guarded, and the jury were instructed to consider it only for that purpose.

MASTER AND SERVANT—INJURY FROM UNGUARDED SAW—DEFENSES—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION OF FACT. A corporation, the owner of a shingle mill, cannot avoid responsibility for injuries to employees by showing that the mill had been leased to an independent contractor who was in full charge and control at the time of the accident, where it appears that the lessor was one of the stockholders of the owner, and had previously been the general manager of the mill, that no announcement of the lease was made, except privately to one or two employees, and the change was not indicated in any way, that the employees generally did not know of the change and received their pay in checks of the corporation, and the lessor had stated that he could not settle the claim without authority from the company.

COMPROMISE AND SETTLEMENT — ATTORNEY AND CLIENT—LIMITATION OF AUTHORITY—NOTICE—QUESTION FOR JURY. It is for the jury to determine whether a claim for a death loss has been compromised by the payment of $500 to an attorney for the widow of the deceased, when, according to strong evidence, the defendant was informed that the attorney's authority was limited to the acceptance of $5,000 to be paid in the presence of the widow, and the widow repudiated the settlement soon after learning of it, and returned the check for the money which she received from the attorney.

ROOT, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered April 29, 1905, upon the verdict of a jury rendered in favor of the plaintiff for damages for the death of an employee, a power bolter's helper, falling upon a unguarded saw. Affirmed.

Reynolds & Griggs and *Bell & Austin,* for appellant. The plaintiff assumed the risk. *Week v. Fremont Mill Co.,* 3 Wash. 629, 29 Pac. 215; *Hogele v. Wilson,* 5 Wash. 160, 31 Pac. 469; *Jennings v. Tacoma R. etc. Co.,* 7 Wash. 275,

34 Pac. 937; *Schultz v. Johnson,* 7 Wash. 403, 35 Pac. 130; *Olson v. McMurray Cedar Lum. Co.,* 9 Wash. 500, 37 Pac. 679; *Bullivant v. Spokane,* 14 Wash. 577, 45 Pac. 42; *Hoffman v. American Foundry Co.,* 18 Wash. 287, 51 Pac. 385; *Anderson v. Inland Tel. etc. Co.,* 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Johnson v. Tacoma Mill Co.,* 22 Wash. 88, 60 Pac. 53; *Brown v. Tabor Mill Co.,* 22 Wash. 317, 60 Pac. 1126; *French v. First Avenue R. Co.,* 24 Wash. 83, 63 Pac. 1108; *Robare v. Seattle Traction Co.,* 24 Wash. 577, 64 Pac. 784; *Krickeberg v. St. Paul Lum. Co.,* 37 Wash. 63, 79 Pac. 492; *Steeples v. Panel etc. Box Co.,* 33 Wash. 359, 74 Pac. 475; *Bier v. Hosford,* 35 Wash. 544, 77 Pac. 867; *Beltz v. American Mill Co.,* 37 Wash. 399, 79 Pac. 981. The plaintiff was guilty of contributory negligence. *Lewis v. Simpson,* 3 Wash. 641, 29 Pac. 207; *Richardson v. Carbon Hill Coal Co.,* 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338; *Cooney v. Great Northern R. Co.,* 9 Wash. 292, 37 Pac. 438; *Day v. Cleveland etc. R. Co.,* 137 Ind. 206, 36 N. E. 854; *Reynolds v. Northern Pac. R. Co.,* 22 Wash. 165, 60 Pac. 120; *Danuser v. Seller & Co.,* 24 Wash. 565, 64 Pac. 783; *Robare v. Seattle Traction Co.,* 24 Wash. 577, 64 Pac. 784; *Green v. Western American Co.,* 30 Wash. 87, 70 Pac. 310; *Johnson v. Anderson etc. Lum. Co.,* 31 Wash. 554, 72 Pac. 107. There were two ways of doing the work, one safe and the other dangerous. *Watts v. Hart,* 7 Wash. 178, 34 Pac. 423, 771; *Malmstrom v. Northern Pac. R. Co.,* 20 Wash. 195, 55 Pac. 38; *Jennings v. Tacoma R. etc. Co., Hoffman v. American Foundry Co., Reynolds v. Northern Pac. R. Co., Beltz v. American Mill Co.* and *Johnson v. Anderson etc. Lum. Co., supra.* It was error to admit evidence of experiments as to the placing of guards after the accident. *Bell v. Washington Cedar Shingle Co.,* 8 Wash. 27, 35 Pac. 405; *Townsend v. Northern Pac. R. Co.,* 29 Wash. 185, 69 Pac. 750; *Carter v. Seattle,* 21 Wash. 585, 59 Pac. 500; *Stevens v. Boston Elev. R. Co.,* 184 Mass. 476, 69 N. E. 338; *Morse v. Minneapolis etc. R. Co.,* 30

Minn. 465, 16 N. W. 358. Mr. Palmer was an independent contractor, solely liable for the injury. *Ziebell v. Eclipse Lum. Co.*, 33 Wash. 591, 74 Pac. 680; *Connors v. Hennessey*, 112 Mass. 96; *New Albany etc. Mill v. Cooper*, 131 Ind. 363, 30 N. E. 294; *Reier v. Detroit Steel etc. Works*, 109 Mich. 244, 67 N. W. 120; *King v. New York Cent. etc. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672, 37 L. Ed. 582; *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776. The damages were duly released. *Pederson v. Seattle etc. R. Co.*, 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; Bigelow, Fraud, 123; *Rose v. West Philadelphia R. Co.* (Pa.), 12 Atl. 78. The action was brought at common law and not under the factory act. *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; Dresser, Employer's Liability, pp. 14, 20, 23; Buswell, Personal Injuries, § 228; *Coughlin v. Boston Tow-Boat Co.*, 151 Mass. 92, 23 N. E. 721; *Clark v. Merchant's etc. Transp. Co.*, 151 Mass. 352, 24 N. E. 49; *Dacey v. Old Colony R. Co.*, 153 Mass. 112, 26 N. E. 437; *Clark v. New York etc. R. Co.*, 160 Mass. 39, 35 N. E. 104; *Clare v. New York etc. R. Co.*, 172 Mass. 211, 51 N. E. 1083; *Mobile etc. R. Co. v. Holborn*, 84 Ala. 133, 4 South. 146; *Laughran v. Brewer*, 113 Ala. 509, 21 South. 415; *Colorado Elevator Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28; *Griffiths v. Earl of Dudley*, 9 Q. B. D. 357; *Gibbs v. Great Western R. Co.*, 12 Q. B. D. 208; *Weblin v. Ballard* 17 Q. B. D. 122; *Lovell v. De Bardelaben etc. Iron Co.*, 90 Ala. 13, 7 South. 756. It was error to instruct that there would be no contributory negligence or assumption of risk if the saw was unguarded. *Narramore v. Cleveland etc. R. Co.*, 96 Fed. 298, 48 L. R. A. 68; *Krause v. Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Lake Erie etc. R. Co. v. Craig*, 73 Fed. 642; *Pittsburg etc. Coal Co. v. Estienvenard*, 40 N. E. 725; *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, 46 Am. St. 299; *Holum v. Chicago etc. R. Co.*, 80 Wis. 299, 50 N. W. 99; *Grand v. Michigan etc. R. Co.*, 83 Mich. 564, 47 N. W. 837, 11 L. R. A.

402; *Taylor v. Carew Mfg. Co.*, 143 Mass. 470, 10 N. E. 308. Contrary to the doctrine of the *Narramore* case, are the following: *St. Louis Cordage Co. v. Miller*, 126 Fed. 495; *White v. Wittemann Lith. Co.*, 131 N. Y. 631, 30 N. E. 236; *Langlois v. Dunn etc. Mills* (R. I.), 57 Atl. 910; *Martin v. Chicago etc. R. Co.*, 118 Iowa 148, 91 N. W. 1034, 96 Am. St. 371, 59 L. R. A. 698; *Swenson v. Osgood etc. Mfg. Co.*, 91 Minn. 509, 98 N. W. 645; *Anderson v. Nelson Lum. Co.*, 67 Minn. 79, 69 N. W. 630; *McGinty v. Waterman*, 93 Minn. 242, 101 N. W. 300; *Thompson v. Allis Co.*, 89 Wis. 523, 62 N. W. 527; *Helmke v. Thilmany*, 107 Wis. 216, 83 N. W. 360; *Dugan v. Chicago etc. R. Co.*, 85 Wis. 609, 55 N. W. 894; *Schneider v. Chicago etc. R. Co.*, 99 Wis. 378, 75 N. W. 169; *Higgins Carpet Co. v. O'Keefe*, 79 Fed. 900; *Glenmont Lumber Co. v. Roy*, 126 Fed. 524; *Grand v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837, 11 L. R. A. 402; *Ford v. Chicago etc. R. Co.*, 106 Iowa 85, 75 N. W. 650; *Victor Coal Co. v. Muir*, 20 Colo. 320, 38 Pac. 378, 46 Am. St. 299, 26 L. R. A. 435; *Birmingham R. etc. Co. v. Allen*, 99 Ala. 359, 13 South. 8, 20 L. R. A. 457; *Knisley v. Pratt*, 148 N. Y. 372, 42 N. E. 986, 32 L. R. A. 367; *Cleveland etc. R. Co. v. Baker*, 91 Fed. 224; *O'Maley v. South Boston Gas Light Co.*, 158 Mass. 135, 32 N. E. 1119, 47 L. R. A. 161; *Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815; *Mulhern v. Lehigh Valley Coal Co.*, 161 Pa. St. 270, 28 Atl. 1087; *Williams v. Wagner Co.*, 110 Wis. 456, 86 N. W. 157; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Keenan v. Edison Elec. etc. Co.*, 159 Mass. 379, 34 N. E. 366; *Goodridge v. Washington Mills Co.*, 160 Mass. 234, 35 N. E. 484; *Pierce v. Contrexville Mfg. Co.*, 25 R. I. 512, 56 Atl. 778; 3 Elliott, Railroads, § 1315, with notes; Dresser, Employers' Liability, §§ 82, 116; Bailey, Master's Liability, p. 280; Buswell, Personal Injuries, §§ 207, 209.

Hathaway & Alston and *E. W. Bundy*, for respondent.

MOUNT, C. J.—The respondent, as the widow of W. A. Erickson, deceased, brought this action against the appellant to recover damages occasioned by the death of her husband in appellant's mill. The complaint in substance alleges, that the respondent is the widow of W. A. Erickson, deceased; that the appellant owned and operated a shingle mill in Everett, and that her said husband was employed by appellant in said mill; that his duties were to work near a circular saw forty-four inches in diameter; that while exercising due care her said husband slipped and fell into said saw, and was killed. The negligence alleged is that appellant neglected and failed to guard said saw, although the same could have been guarded advantageously, and that said appellant failed to furnish her husband with a safe place in which to work.

Appellant answered the complaint and alleged that it owned the mill, but denied that it was operating the said mill at the time of the death of Mr. Erickson, denied that it employed Mr. Erickson, or that he was working for appellant at the time of his death, and denied any neglect of duty. As a first affirmative defense, appellant alleged that, on January 1, 1904, some five months before the injury, it had leased the said mill to one J. R. Palmer, who at the time of the accident had full charge of the mill and machinery, and employed all the men, including the said W. A. Erickson, and was manufacturing shingles for the appellant at the rate of fifty-two cents per thousand on his own account; that appellant had nothing whatever to do with the mill, or the men in charge thereof, or employed therein. As a second affirmative defense the answer alleged that the saw in question was as thoroughly and advantageously guarded as it was possible for the same to be guarded and operated; that said W. A. Erickson was furnished a reasonably safe place in which to work; that the dangers thereof were open and apparent, and well known to said Erickson, and were the usual risks and dangers incident to his employment, and that he assumed the risks thereof. As a third affirmative defense the answer alleged

that the death of said W. A. Erickson was caused solely by a want of proper care and caution on his part, and was due solely to his contributory negligence. As a fourth affirmative defense the answer alleged a full and complete settlement and satisfaction of the cause of action stated in the complaint, by the payment of $500 by said J. R. Palmer, the lessee of the mill, to one George P. Rossman, an attorney for the respondent, said attorney having full power and authority from the respondent to make the settlement.

Respondent in reply denied all the allegations of the affirmative defenses, and in reply to the affirmative matter contained in the fourth affirmative answer, alleged that the said attorney Rossman had no authority to settle the claim for less than $5,000, and that said Palmer had notice thereof prior to the time of the alleged settlement; that immediately after she was notified of the settlement for $500, she repudiated the same, and returned the money which was sent to her. Upon these issues the cause was tried to the court and a jury, which returned a verdict in favor of the respondent for $5,000. The appeal is prosecuted from a judgment rendered upon the verdict.

There is no dispute as to how the accident happened which caused the death of W. A. Erickson, and there is no dispute as to the condition of the saw, or the mill in which the death occurred. The facts in relation to these matters are substantially as follows: The mill was owned by the appellant. It is located on the water front in Everett. To the west of the mill, logs were kept in a boom in the water. These logs were brought up out of the water through a log chute, and into the west side of the mill through an opening about twelve feet wide by eight feet high. About fifteen feet from this opening, and at right angles to the log chute, was a large drag saw operated by steam power, which saw was used to cut logs into blocks about sixteen inches long. These blocks when cut from the log dropped on to a deck about ten feet wide by twelve feet long, which was called a "sapping" deck.

In the southeast corner of this sapping deck, on a level and connected with it, was the power bolter's saw carriage. This carriage was about four feet wide by eight feet long, covered over the top with sheet iron. It was a movable platform with a slit running lengthwise down the center. Through this slit the saw revolved as the carriage moved back and forth along the saw. Immediately to the south of the center of this carriage and opposite the slit, was located a stationary circular saw fifty-two inches in diameter. This carriage and saw were used for the purpose of splitting round blocks into bolts, suitable for the shingle machines. Round blocks, one or more at a time, were taken from the sapping deck and placed upon the power bolter's carriage, over the slit therein, and then, by means of a lever, the carriage was caused to run forward into the saw which would cut the round blocks into the proper size. By reversing the lever the carriage would move back to its position in the southeast corner of the sapping deck. The blocks would then be removed from the carriage and more round blocks placed thereon. At the end of this carriage next to the saw, an iron frame extended across the carriage. At the place of the slit in which the saw revolved, this frame extended higher than the saw, forming a yoke or bow, which permitted the saw to pass through. This frame served to make the carriage solid at that end, and also as a guard to protect blocks from rolling into the saw prematurely. There was ample light in the mill about the sapping deck and power bolter's saw and carriage. The machinery was all in good order and repair.

W. A. Erickson, deceased, was employed as power bolter's helper in the mill. His duties were to take round blocks from the sapping deck and place them upon the power bolter's saw carriage. He used a short iron hook in turning, rolling, or lifting the blocks when necessary to place them upon the saw carriage. He had been engaged in this work for about eight or nine days previous to the day of the accident. On May 13, 1904, at about four o'clock in the afternoon, a round

cedar block was lying on its circumference with the axis of the block at right angles to the power bolter's carriage, and within a foot or so of the carriage, not far from the southeast corner of the sapping deck. It was within four or five feet of the saw, which was revolving from nine hundred to fourteen hundred revolutions per minute. The saw was unguarded, except for the iron inverted U-shaped frame at the end of the carriage next to the saw. The shingle block was a cedar block sixteen inches long, two or three feet in diameter, and weighing from seventy-five to one hundred pounds. The circumference of the block was covered with a thin bark.

Mr. Erickson came up to the block for the purpose of rolling or sliding it on to the power bolter's carriage. He stood with his back toward the saw, being between the block and the saw. He reached down with his hook, which he struck into the east end of the block, being the end nearest to him. The hook caught in the wood of the block just under the bark. He then pulled toward himself hard enough so that the wood and bark gave way, which caused him to lose his balance and fall backward upon the saw. His head was severed from his body. The other facts in the case necessary to an understanding of the points presented will be stated hereafter in connection therewith. At the conclusion of the respondent's testimony, and again at the conclusion of all the testimony in the case, the appellant moved the court for a directed verdict upon the grounds, that respondent's husband met his death by a risk which was open and apparent, and therefore assumed; that all the testimony showed that he was guilty of contributory negligence; that he was employed by J. R. Palmer, who was an independent contractor for whose negligence appellant was not liable, and that the cause of action had been settled and discharged.

It may be conceded in this case that, but for the provisions of the factory act of 1903, respondent's husband assumed the risk which caused his death. The mill was well lighted and all the machinery was in good order and repair. There were

no hidden or latent dangers or defects. The dangers were open and apparent. Whether the deceased assumed the risk, therefore, depends upon the fact whether the saw was guarded, or should have been properly guarded under the factory act. Laws 1903, page 40. If the saw could have been guarded advantageously and was not so guarded, appellant was negligent, assuming, of course, that it was in charge of the mill; and the deceased did not assume the risk under the rule in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lumber Co., ante* p. 153, 83 Pac. 98, and *Hoveland v. Hall Bros. Marine R. etc. Co., ante* p. 164, 82 Pac. 1090.

The evidence conclusively shows that the saw in question was open and exposed. It was located at the southeast corner of the sapping deck, and was revolving at from nine hundred to fourteen hundred revolutions per minute. It extended about twenty-four inches above the level of the floor of the sapping deck. The saw was manifestly dangerous to those who were required to work around it or near it, as the deceased was required to do. His work required him to be within six or eight feet of the saw a large portion of the time. If this saw was properly guarded, then there was no negligence on the part of the appellant. If it was not properly guarded, then the company was negligent as a matter of law and the deceased did not assume the risk. *Hall v. West & Slade Mill Co., supra; Hansen v. Seattle Lumber Co., ante* p. 349, 83 Pac. 102.

Appellant claimed that the iron yoke at the end of the carriage served as a guard, but there was evidence that this iron was no guard at all against dangers to employees; that its only purpose was to hold that end of the carriage solid, and to protect blocks from coming in contact with the saw prematurely. A glance at the model of the mill, and the photographs contained in the record, convinces us that there is no merit in the claim that this was a proper guard against dangers of the saw, and that its only purpose was as stated

above. There was evidence that a proper guard could have been placed over, or by the side of, the saw at trifling expense, so that it would have been comparatively safe, and with no inconvenience or detriment to the operation of the saw. It is true, this evidence was disputed by some of the witnesses for the appellant. Under this state of the evidence the question of assumption of risk became a question for the jury. If the saw could have been guarded advantageously without material detriment to its usefulness, it became the duty of the operators of the mill to so guard it, so that employees might not be injured thereon. The neglect of duty in this respect was negligence of the company. If it could not have been guarded advantageously, then there was no duty to guard it and no negligence on the part of the company, and the deceased assumed the risk. There was sufficient evidence to take these questions to the jury in this case.

The many cases from this court cited by appellant in its brief upon the question of assumed risk were decided before the passage of the factory act which controls this case, and do not involve questions where there was a statutory duty to protect employees. The question of assumed risk was controlled in those cases by common law rules which we held, in *Hall v. West & Slade Mill Co., supra,* do not apply where there is a violation of statutory duty.

Appellant argues that the deceased was guilty of contributory negligence as a matter of law; that his negligence consisted in standing near the saw with his back toward it, in striking his hook into the east end or end of the block toward him, and in pulling against the block with sufficient force to fall backward when the hook pulled out of the block. These facts no doubt tend to show contributory negligence and, if these were the only facts shown, they might be sufficient for that purpose. But there is evidence to the effect that the sapping deck was filled up with blocks; as some of the witnesses stated, the deck was "swamped," so that it became necessary for the deceased to stand at the southeast corner

of the sapping deck nearest the saw in order to place the blocks on the power bolter's carriage, and that he could not do his work in any other place or in any other way. There was also evidence to the effect that the usual and customary way of sliding or rolling blocks on to the power bolter's carriage was to take the blocks as they came without reference to the way the face was turned, and that the hook was usually placed in the end of the block which was most convenient. It is true the witnesses did not agree upon these points. They were all disputed, and there was evidence that the deceased was told when he went to work that he must always work with his face to the saw. But in view of the evidence that the sapping deck was "swamped," or filled up with blocks, and that it was necessary for the deceased to have his back toward the saw at the time he was injured, and under the circumstances which appear to have surrounded him at that time, we think the question of contributory negligence was a question of fact for the jury and not a question of law for the court, because reasonable minds might well differ as to whether or not he was conducting himself under the circumstances as a reasonably prudent man would have done.

The question whether or not the saw could have been advantageously guarded was one of the contested and important facts in the case. During the trial, the court permitted evidence of the fact that the same saw was afterwards guarded in the way some of the witnesses testified it could have been guarded. This evidence was admitted over the objection of appellant's counsel, and is now alleged as error. The court in admitting the evidence stated that it would be allowed only for the purpose of determining the question whether the saw could have been advantageously guarded at the time of the injury, and the jury were then and subsequently instructed to that effect. The general rule is that the taking of precautions against the future is not to be construed as an admission of responsibilities in the past, and evidence of what has been

done since an accident occurred is not admissible. *Bell v. Washington Cedar Shingle Co.*, 8 Wash. 27, 35 Pac. 405; *Stack v. Nolte*, 29 Wash. 188, 69 Pac. 753. But the avowed purpose here was to show that the saw could have been advantageously guarded, and the jury were instructed to consider it only for that purpose. The fact that it was afterwards guarded by placing a board to the side of it, or placing a hood over it, which guards did not interfere with the practical operation of the saw, was conclusive evidence that it could have been advantageously guarded prior to the time of the injury. These were simple and practical guards, which required no expert or other special knowledge to discover, and which any ordinary person could and should have known about. The statute required proper safeguards for such saws. The fact that the same or similar s ws were subsequently, and within a very short time, guarded by placing a hood over them was, we think, competent evidence that this one could have been advantageously guarded at the time of the injury, and its reception was not error where the jury were told plainly the only purpose for which it might be considered.

Appellant contends that the evidence shows that, at the time of the injury, J. R. Palmer was operating the mill as an independent contractor, and that he alone was liable, if there was any liability in the case. It is true that Mr. Palmer and Mr. E. J. McNeeley testified that on January 1, 1904, Mr. McNeeley, as president of the appellant corporation, entered into a contract with Mr. Palmer, by which contract the corporation was to furnish the mill and logs necessary to operate it, and that Mr. Palmer was to keep the mill in repair and employ the labor and manufacture shingles at fifty-two cents per thousand for the corporation, for the term of one year, and that at the time of the injury to Mr. Erickson, the mill was being run under such agreement. One or two employees also testified that Mr. Palmer, prior to the time of the accident, told them privately that he was running the mill on his own account. It was admitted, that Mr.

Palmer and Mr. McNeeley and their wives held all the stock in the appellant corporation; that Mr. Palmer had been the general manager of the mill for several years prior to that time, and had the control thereof and of the employment of the men; and that, when he assumed control as independent contractor, there was no announcement of the fact except privately to one or two employees, and there was nothing visible around the mill or in connection therewith to indicate any change in the management; that the employees all received their pay in checks of the corporation, and that there were no changes in the apparent management of the mill, and the employees generally did not know of any change; and subsequent to the time of the accident, Mr. Palmer, in attempting to make a settlement of the case with the respondent, stated to her, in the presence of others, that he had no authority to make a settlement, but would submit the matter to the company. Mr. Palmer upon the witness stand admitted that he had made such statements. Under these circumstances it was a question of fact for the jury whether there was a lease of the property to Mr. Palmer who was operating for himself in good faith. The admission of Mr. Palmer to the respondent, after the injury occurred, that "I do not know . . . that I could get the company to say it would settle. I have no power whatever to settle with you," goes very strongly to show that he was not an independent contractor, and to discredit this defense.

Upon the question of the settlement, it was admitted that the respondent placed the case in the hands of one Rossman, an attorney, with full power to bind her in any suit or settlement, and that Mr. Palmer was informed of this fact. There was very strong evidence to the effect that Mr. Palmer was informed that Mr. Rossman's authority to settle the case was limited to $5,000, and further that no money would be paid except in the presence of the respondent, and that, after receiving this information, Mr. Palmer went to Mr. Rossman and made a settlement, without the knowledge or consent of

the respondent, for $500. Soon after respondent learned of this settlement, she repudiated it and returned the check for the part of the money which she received from Mr. Rossman. Mr. Palmer, however, denied that he had any knowledge of the authority of Mr. Rossman other than what was contained in the contract between the respondent and Mr. Rossman. If he had knowledge of the limitation upon Mr. Rossman's authority before the settlement was made, he was, of course, bound by it. The evidence on this question made it a case for the jury, not for the court.

Upon the submission of the case to the jury, the court very fairly and properly instructed the jury upon each of the points hereinbefore discussed. In fact, the only criticisms of appellant upon the instructions are based upon the questions of assumption of risk, of the admissibility of the evidence hereinbefore referred to, and that the court refused to give a peremptory instruction for a verdict in favor of the appellant. Our disposition of these questions above makes it unnecessary to further refer to these instructions.

We find no error in the record. The judgment is therefore affirmed.

CROW, RUDKIN, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

ROOT, J., dissents.

[No. 5745. Decided January 30, 1906.]

SARAH O. SAWYER, *Respondent*, v. VERMONT LOAN AND TRUST COMPANY, *Appellant*.[1]

APPEAL—ASSIGNMENT OF ERRORS—BRIEFS—STRIKING. A brief assigning fifty-nine errors, in which only three questions of law are discussed at length, will not be struck out for failure to discuss each error or to confine the discussion to the errors assigned, where the respondent has retaliated to the argument with a brief of 160 pages.

ATTORNEY AND CLIENT—AUTHORITY—WHO MAY QUESTION—RATIFICATION. A third person has no right to question the authority of an attorney for the purpose of collection, who takes a deed in settlement of the claim and records the same without notice to the client, especially where the client ratified such action.

RECORDS—DEED FILED BUT NOT INDEXED—PRIORITY. Where a quitclaim deed by a mortgagor was filed for record in the auditor's office several days before the filing of a *lis pendens* in an action to foreclose the mortgage, the finding of the trial court that the quitclaim deed has priority over the *lis pendens* will not be disturbed on appeal, although there was some evidence that the index required by the statute to be kept by the county auditor did not show the quitclaim deed at the time of the filing of the *lis pendens* (DUNBAR, J., dissenting).

SAME—DELAY IN RECORDING DEED—EFFECT. The neglect of the county auditor to record an instrument for more than twenty days after it has been filed for record cannot militate against the party filing the instrument, if it was properly indexed.

HUSBAND AND WIFE—PARTIES—PARTITION—ACTION AS TO WIFE'S REAL ESTATE—NONRESIDENTS—WHAT LAW GOVERNS. Under the laws of the state of New Hampshire, a wife domiciled in that state, and owning an interest in real property in this state, may maintain an action in this state for a partition without joining her husband as party plaintiff.

DESCENT AND DISTRIBUTION—COMMUNITY PROPERTY—INTEREST OF WIFE. Upon the death of the husband leaving issue the wife becomes entitled to a three-fourths interest in the community real estate.

MORTGAGES — FORECLOSURE — PARTIES — HEIRS OF DECEASED MORTGAGOR. After the death of a mortgagor, the heirs are necessary parties defendant to an action for the foreclosure of the mortgage.

MORTGAGES — RIGHTS OF MORTGAGEE IN POSSESSION UNDER VOID SALE—TENDER OF MORTGAGE DEBT—PARTITION. A mortgagee in pos-

[1]Reported in 84 Pac. 8.

session in good faith under a void foreclosure sale, cannot be subjected to an action for a partition brought by heirs of the mortgagor, unless they tender their proportion of the amount due upon the mortgage; and a decree in partition in such a case will be modified by requiring such payment within sixty days, upon pain of a dismissal of the action.

Appeal from a judgment of the superior court for Spokane county, Linn, J., entered January 16, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury in an action for partition and an accounting. Modified.

A. E. Gallagher and *W. J. Thayer,* for appellant.

James Dawson and *F. E. Langford,* for respondent.

Root, J.—This action was commenced for the partition of certain real estate and for an accounting as to the rents and profits thereof. Respondent alleges, that she owns an undivided three-fourths, and the appellant an undivided one-fourth, of said property; that appellant ousted respondent from the possession thereof, and appropriated the entire rents and profits to its own use, and has not accounted therefor to respondent. Appellant denies respondent's title, and alleges, as affirmative defenses, foreclosure proceedings, adverse possession, seven years' payment of taxes, and no joinder of respondent's husband.

The facts were about these: In 1890 one Hattie G. Tilton and her husband, F. A. Tilton, executed to appellant a mortgage upon this property. In 1892 said F. A. Tilton died intestate, leaving his wife, said Hattie G. Tilton, and four children surviving him. On April 15, 1895, there was filed for record in the office of the county auditor a quitclaim deed of all of the interests of said Hattie G. Tilton to this respondent, who is her mother, and to whom it is claimed there was an indebtedness owing at that time which was settled by the execution and delivery of said deed. This deed was delivered to one Danson, who was an attorney for respondent,

having in charge the collection of the indebtedness of respondent against said Hattie G. Tilton. Said Danson placed said deed of record without first having notified respondent, who resided in one of the New England states.

On the 18th day of April, 1895, appellant commenced an action to foreclose said mortgage, and made said Hattie G. Tilton, both in her individual capacity and as administratrix of the estate of her late husband, together with all of the children, defendants, and the usual proceedings were had, culminating in a judgment and decree, and a sale of the property and confirmation thereof. The property was bought in at said sale by appellant, who has ever since been in possession thereof. On the said 18th day of April, 1895, appellant filed in the office of said county auditor a notice of *lis pendens* in the usual form. The quitclaim deed filed as aforesaid on the 15th day of April was not, as a matter of fact, recorded until May 14, 1895.

Appellant contends, (1) that the deed was taken and filed without authority; (2) that the deed was not indexed when the *lis pendens* was filed, and was not notice to the appellant until after it was indexed; (3) that the filing of the deed, without authority of respondent and without her knowledge and consent and before she accepted it, could not be notice to the appellant; (4) that even if it was notice, such notice was good only for twenty days, and expired before May 14, 1895, when it was recorded, and that it then lost its priority over the *lis pendens;* (5) that respondent never accepted a deed; (6) that Eli D. Sawyer, husband of respondent, was and is a necessary party to this proceeding; (7) that, at most, the respondent acquired only a one-half instead of a three-fourths interest in the property.

Appellant in its brief assigns fifty-nine errors, but says: "There are only three questions in this case, . . . the other assignments being made because they depend upon errors to be considered under the three questions . . . First: Did the plaintiff, or the community composed of the

plaintiff and her husband, acquire any interest in the property in question by the deed from Hattie G. Tilton to plaintiff, of date April 15, 1895, as against appellant's foreclosure? Second: If any interest was acquired in the property in question, was that a community interest or the separate property of the respondent? . . . Third: If an interest was acquired and it was separate property of the respondent, was that a half interest or a three-fourths interest in the property in question?"

Respondent moves to strike appellant's brief, for the following reasons:

"(1) Appellant has wholly failed and refused to discuss any one of the many alleged errors assigned in its brief; and the same are thereby waived, and there is nothing before the court to decide. (2) Appellant has confined the discussion in its brief to matters not assigned as errors in its said brief. (3) It nowhere appears, by said brief, that any of the questions that are discussed in its said brief were ever called to the attention of the court below or passed upon by the court."

Appellant has an opening brief of one hundred and forty-five pages. Respondent retaliated with a brief of one hundred and sixty pages, to which appellant made retort with a brief of fifty-two pages. While there is some merit in the motion, yet on the whole, we do not think it well to strike the briefs. The motion will be denied.

We will endeavor to notice the appellant's contentions *seriatum*. We think the attorney Danson had authority to accept this deed in payment of the indebtedness from Mrs. Tilton to respondent, and we cannot see how appellant can be regarded as being in a position to question Danson's authority in the premises. It is evident that his authority was ratified by his client; and even if there had been no express authority, we think the ratification would be binding as against appellant.

The question of priority as between the quitclaim deed and the *lis pendens* presents some difficulty. It is conceded that the quitclaim deed was filed for record in the auditor's office

several days before the *lis pendens* was filed, and before the foreclosure action was commenced. The quitclaim would therefore be presumed to have priority. But there was some evidence that the index required by the statute to be kept by the county auditor did not show the quitclaim deed at the time of the filing of the *lis pendens*. In the light of all the evidence, we do not feel justified in making a finding on this question which would overturn the trial court's judgment.

The question of authority of Danson to receive the quitclaim deed could not have a bearing upon the question of priority of filing under the circumstances revealed in this case.

We cannot agree with the appellant's contention that the notice by the filing of said quitclaim deed would be good for only twenty days, unless said deed was actually recorded. When a person has filed in the county auditor's office for record an instrument authorized to be recorded, we do not think the delay or neglect of the county auditor in actually recording said instrument can militate against the party who duly filed said instrument for record, if it was promptly and properly indexed in the book required by law to be kept for that purpose. *Malbon v. Grow,* 15 Wash. 301, 46 Pac. 330. We think it clearly appears that respondent did accept the quitclaim deed.

We do not think that respondent's husband was a necessary party to this suit. The statutes of New Hampshire (the home state of respondent and her husband) which are pleaded, together with the evidence in the case sufficiently show authority in respondent to maintain the action in her sole name and right.

The evidence showed that one-half of the property at the time the mortgage was given was the separate individual property of Mrs. Tilton. When her husband died the community existing between herself and him was dissolved and she then became the owner of an undivided one-half interest in and to the other half of the property which they had owned together as community property. The statute (Bal. Code,

§ 4640) provides that, upon the death of an owner of real estate, the same immediately descends to his heirs. Hence, when Mrs. Tilton made the quitclaim deed to respondent, she thereby conveyed all of her interst in and to said property, which was a three-fourths interest, subject to the mortgage. This court has held that, in a foreclosure proceeding against real estate, where the mortgagor has, since the execution of the mortgage, died, it is necessary to make his heirs at law parties defendant. *Anrud v. Scandinavian-American Bank,* 27 Wash. 16, 67 Pac. 364. Mrs. Tilton having deeded all of her interests to the respondent, and the latter not having been made a party defendant in the foreclosure proceedings, it follows that her rights in and to the property were in no wise affected by such court proceedings.

But under the facts admitted and established in this case, we do not believe respondent was entitled to the relief given by the honorable superior court. It is evident that appellant was unaware of the deed from Mrs. Tilton to respondent, at the time of the entry of judgment, and decree, and until long after the sale and shortly before the commencement of this action. Respondent has never paid any portion of the indebtedness which was secured in part by the property which was conveyed to her by her daughter. It has been held by this court that, when a mortgagee takes possession in good faith after sale, as purchaser, under a void foreclosure proceeding, he becomes, in effect, a mortgagee in possession, against whom the statutes of limitation do not run, and that he may be given equitable relief. *Sloane v. Lucas,* 37 Wash. 348, 79 Pac. 949; *Investment Securities Co. v. Adams,* 37 Wash. 211, 79 Pac. 625. We do not think respondent established facts sufficient to entitle her to a partition unconditionally.

The case will be remanded to the superior court with the following instructions: Respondent may, within sixty days from the filing of the remittitur in the clerk's office of the

trial court, pay to appellant, or into the registry of the court for its use, three-fourths of the amount justly due and owing on account of the indebtedness secured by said mortgage, to be ascertained as follows: Three-fourths of the amount of principal and interest (not including costs or attorney's fees) due at the time of the entry of the judgment and decree in the foreclosure suit, together with interest at twelve per cent per annum as provided in the note, mortgage and judgment, on said sum to date when payment shall be made, less the amount by which the three-fourths of the rents and profits exceed three-fourths of the taxes, repairs, and improvements made upon said property by appellant with legal interest on all thereof; said sum to be determined from the findings in this case, and by evidence covering the time elapsing from the date the judgment was entered in the superior court in this case up to the time when final judgment shall have been entered or payment made. Upon making such payment, respondent may amend her complaint and have a judgment and decree awarding to her a three-fourth's interest in and to said property to be partitioned by the trial court. If such payment be not made within the sixty days prescribed, a judgment of dismissal shall be entered against respondent. Neither party shall recover costs on this appeal.

MOUNT, C. J., HADLEY, and RUDKIN, JJ., concur.

DUNBAR, J. (dissenting)—It appearing to my satisfaction that respondent's deed was not indexed at the time the *lis pendens* was filed, under the authority of *Ritchie v. Griffiths*, 1 Wash. 429, 25 Pac. 341, 22 Am. St. 155, 12 L. R. A. 384, the respondent is too late to urge her claim. The judgment should therefore be reversed.

CROW, J., having been of counsel, took no part.

[No. 5868. Decided January 30, 1906.]

Omaha National Bank, *Respondent*, v. Emma A. Lindsay, *Appellant*.[1]

Limitation of Actions—Absence From State Tolling Statute—Applicability to Nonresidents. Bal. Code, § 4808, with reference to the tolling of the statute of limitations during the absence of the debtor until his "return" to this state, applies to nonresident debtors who never at any time resided in this state.

Same — Judgment in Action Between Nonresidents — Where Cause Arose. A judgment entered in the courts of this state in favor of a resident of Nebraska against residents of Idaho upon acceptance of personal service, creates a liability which "arose" in this state, within the meaning of the statute of limitations, Bal. Code, § 4818, and the period for the commencement of an action thereon does not begin to run until the judgment debtors remove to this state (Fullerton and Crow, JJ., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 19, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a judgment. Affirmed.

Charles A. Murray, for appellant.

P. C. Shine and *W. L. Husbands*, for respondent.

Root, J.—On the 17th day of February, 1897, a judgment was rendered and entered in the superior court of Spokane county in favor of respondent, a national bank doing business in Omaha, in the state of Nebraska; said judgment being against Emma A. Lindsay, this appellant, and her husband, Milon S. Lindsay, for the sum of $12,972. At that time appellant and her husband were, and ever since have been, residents and citizens of the state of Idaho, residing there continuously. This action was commenced on the 5th day of March, 1904, as a common law action based upon said judgment. Certain defenses interposed by said Milon S. Lindsay were held by the lower court to be good and sufficient, and the action was

[1]Reported in 84 Pac. 11.

dismissed as to him. Appellant interposed as an affirmative defense the plea of the statute of limitations, setting up § 4030 of the revised statutes of Idaho, which provides that, "civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except when in special cases, a different limitation is prescribed by statute," and alleging that § 4051 of said revised statutes of Idaho makes six years the period in which an action may be begun upon a judgment of any court of the United States or of any state or territory therein; and that there were no other statutes contravening the provisions of these pleaded. The lower court held the defense insufficient, and gave judgment in favor of respondent. From this judgment an appeal is prosecuted.

The only question presented is as to the statutes of limitation. Appellant maintains that, as she was a resident of Idaho at the time the judgment sued on was made and entered in this state, she could have been immediately sued in Idaho upon said judgment, and that consequently the statutes of limitation in Idaho began to run at that time, and that, as six years had expired prior to the commencement of this action, the latter is barred. She maintains that this action "arose" in Idaho, for the reason that, at the time of the entry of the judgment which constitutes the subject-matter of this suit, she could have been sued in Idaho and in no other state, inasmuch as the courts of no other state could have had jurisdiction both of the subject-matter and her personally.

Respondent maintains that the cause of action arose in this state; that the judgment was taken in a suit by consent of the appellant and her husband, and that they were, for all legal purposes, deemed to have been present and residents of the state of Washington at the time said judgment was entered; and that, even if they be not deemed to have been present and residents of the state at that time, nevertheless the fact of the court's then and there having jurisdiction of the subject-matter, and having properly and legally made and

entered the judgment, such judgment at its inception marked the time when the cause of action originated for the present action. It is also suggested that, if the entry of the judgment did not constitute an "arising" of the cause of action in this state, said entry of judgment gave rise to the cause of action in the state of Nebraska, of which state the respondent was then a resident; that the judgment being personal property, its situs was at the home of the owner; and that, inasmuch as the statutes of limitation of the state of Nebraska are not pleaded, no reason appears why the case should not be controlled by the statutes of this state. Respondent relies upon Bal. Code, § 4808, which reads as follows:

"If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action,"

and urges that Bal. Code, § 4818, avails appellant nothing in this case.

Appellant contends that § 4808 is not applicable as against her in this case, for the reason that she never was a resident of this state, and that said section could only apply where the defendant was a resident of the state at the time the cause of action arose, and left afterwards. This court has construed § 4808 as applicable not only to persons who have resided in the state and then removed therefrom, but also to those who have never at any time resided within the state. *Lake v. Steinbach,* 5 Wash. 659, 32 Pac. 767; *Weber v. Yancy,* 7 Wash. 84, 34 Pac. 473. Such construction having been adopted and followed for so long a time must be controlling now.

This leaves only the question as to whether or not § 4818 is available to appellant, and that must be ascertained by a

determination of the question as to whether the action can be said to have "arisen" in this or some other state. We think, under the circumstances of this case, the action must be said to have arisen in this state. This being true, we must, upon the authority of former decisions of the court, hold that the case is governed by § 4808. *Freundt v. Hahn,* 24 Wash. 8, 63 Pac. 1107, 85 Am. St. 939; *Chevrier v. Robert,* 6 Mont. 319, 12 Pac. 702; *Powers Mercantile Co. v. Blethen,* 91 Minn. 339, 97 N. W. 1056; *Goodnow v. Stryker,* 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; *Emerson v. Steamboat Shawano City,* 10 Wis. 433.

The judgment of the superior court is affirmed.

MOUNT, C. J., DUNBAR, RUDKIN, and HADLEY, JJ., concur.

FULLERTON, J. (dissenting)—The cause of action was not the judgment sued on, but the contract which gave rise to the judgment. It did not, therefore, accrue in this state, and the plea of the statute of limitations of Idaho should have prevailed. For this reason I dissent from the conclusion of the majority.

CROW, J., concurs with FULLERTON, J.

[No. 5848. Decided January 31, 1906.]

JOHN LAWRENCE, *Respondent,* v. ALEXIA HALVERSON, *Appellant.*[1]

PARTNERSHIP—AGREEMENT FOR—EVIDENCE—SUFFICIENCY. There is sufficient evidence of a partnership agreement whereby the plaintiff was to perform the work and labor and the defendant to furnish the money to construct a house upon premises to be owned by them jointly, where it appears by the testimony of both parties that the land was bought by the defendant, who also furnished money to buy the materials for the house, and the house was built by the plaintiff pursuant to such an arrangement, the defendant admitting that originally the agreement was that she was to sell the house and the plaintiff was to "get his share when the property was sold."

[1]Reported in 83 Pac. 889.

PARTNERSHIP—TERMINATION. A partnership agreement for the ownership of a house and lot standing in the name of one party cannot be summarily terminated by such party on becoming dissatisfied with the manner of performance of the other party.

EQUITY—JURISDICTION—RETAINING FOR ALL PURPOSES. Where a court of equity acquires jurisdiction of a cause for one purpose, it retains it for other purposes necessary to a final determination of the whole controversy, if they are germane to, or grow out of the matter, and are not distinct legal rights not affected by the adjudication of the equitable questions.

EQUITY—SPECIFIC PERFORMANCE OF PARTNERSHIP AGREEMENT—RELIEF. In an action for the specific performance of a partnership agreement for the joint ownership of premises the legal title to which is held by the defendant, a decree adjudging that the plaintiff be declared the owner of an undivided half interest in the property on condition that a certain balance be paid to the defendant, although the plaintiff is under no obligation to pay the same, is within the equitable powers of the court, on the principle that having acquired jurisdiction for one purpose, it could maintain it for other purposes necessary to a final determination of the controversy which were germane thereto, and grant any relief to which the parties might be entitled.

JUDGMENT—RELIEF CONDITIONAL ON PAYMENT—WHEN TO BE MADE COMPULSORY. Where, in an action between partners, it is found that the plaintiff is entitled to a half interest in certain premises, upon payment to the defendant of a balance due, it is error to enter a decree to that effect, without compelling prompt payment, allowing the plaintiff to speculate in the value of the property, and the decree will be made compulsory within thirty days, with execution for the amount at the end of such time.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 23, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for the specific performance of a copartnership agreement. Modified.

Saulsberry & Stuart, for appellant.

S. D. Wingate, for respondent.

DUNBAR, J.—The complaint alleged substantially, that the plaintiff was a contractor and builder in the city of Seattle; that in the month of March, 1903, an oral contract of co-

partnership was entered into between the plaintiff and defendant, by the terms of which contract it was agreed that the copartners should purchase a certain lot described in the complaint; that plaintiff should improve such lot by grading it and erecting thereon a house, the plaintiff to perform the work and the defendant to furnish such sums as should thereafter be agreed upon between the parties, and that said house and lot should be owned by the plaintiff and defendant as copartners; that in pursuance of said contract the plaintiff entered into a contract for the purchase of the aforesaid lot, paid $30 on account, and in consideration thereof; and that, on the 11th day of April, 1903, said contract of purchase was consummated by the execution of a deed for the conveyance of the aforesaid lot to defendant, upon the payment by the defendant of the sum of $695, being the balance due on account of the consideration money; that it was orally agreed by and between the plaintiff and the defendant, immediately after the execution of the deed to the defendant, that the plaintiff, as a part of his share to be contributed toward the partnership, should grade the lot and excavate for and put in a cement foundation upon which to erect the house, and that such grading was done and the foundation made; that it was afterwards further agreed that a certain double flat building should be erected to cost about $2,800, of which amount the defendant should furnish $1,000 upon the demand of the plaintiff as the work progressed, and the plaintiff should furnish the plans together with lumber, material, labor, etc.; that in accordance with the said agreement the work of erecting the building was begun and progressed, with certain changes mutually agreed upon; that the plaintiff had carried out his part of the partnership agreement in erecting the said building; that the defendant had expressed herself as well satisfied with the work; that on January 5, 1905, the defendant took possession of the building and lot, claiming absolute title and ownership therein, has had possession since, refused to account to plaintiff for his interest or profits in the prop-

erty, and denied any right or interest of the said plaintiff in the property, and refused to settle up in any manner whatever or to convey to the plaintiff his undivided one-half interest in said property. The prayer is, for the dissolution of the partnership; that the defendant be required to pay to plaintiff the amount which shall be found due him on account of the use and occupation of the said building and lot; that the defendant be directed and required to pay to the plaintiff an amount equal to one-half of the costs of the improvements, and be directed and required to grant and convey one equal undivided one-half interest in and to the land in dispute.

A demurrer was interposed to the amended complaint. The record does not show what disposition was made of it, but presumably it was denied, as the defendant interposed an answer to the amended complaint. The answer is, in effect, a general denial of all the essential allegations of the complaint. The defendant denied that she took possession of the property on January 5, 1905, but said that she had continuous possession of the property since she bought the same in 1903, she having admitted that she had bought the same and paid for it herself; in short, denied any right or interest of the plaintiff in or to said property; admitted that no accounting was made, but denied that she was under any obligation to make any accounting; and alleged that the plaintiff had no interest, right, or title in one undivided one-half, or any other interest, in said house and lot. Upon the trial by the court the facts were found substantially as alleged in the complaint, with the addition of the fact that, on the question of the accounting, $631 was due the defendant from the plaintiff, by reason of the amount furnished by each and of the paying of the taxes and of the bills paid generally in the prosecution of the work; and the judgment was that the plaintiff, upon the payment of the sum of $631 to the defendant, was entitled to a decree declaring, adjudging, and decreeing him the owner of an equal undivided one-half interest in and to all that certain tract of land described in the complaint, free from

any and all incumbrances. From this judgment this appeal is taken.

An examination of this record shows conclusively to our minds that the court was warranted in making the findings of fact which it did make. The defendant at first, in harmony with her answer, denied any interest of the plaintiff in the land, testified that no partnership agreement had ever been entered into between them in relation to the land, and that the respondent had no interest in the matter excepting that she had agreed to give him a certain amount of money for building a certain kind of a house. This position was afterwards abandoned, and the appellant testified, in so many words, that the original idea was that there was a partnership ownership of the lot, and that plaintiff was to contribute half, and they were to improve the lot as they could agree; and she finally testified as follows, in answer to the question:

"Will you just state to the court—probably the court is informed but I am not and I would like to know—just exactly what the terms of that contract were. What were the terms of that contract, just as briefly as you can? I was to furnish $1,000 cash; he was to put up a two-story, of five rooms in each story, building in first class way and manner, and keep it free from all incumbrances and debts, and I to sell that house and he would get his share when that property was sold."

The testimony of the appellant, as a whole, outside of the testimony of the respondent and his witnesses, shows conclusively that there was a partnership agreement between them, that the house was started and practically completed under the terms of the agreement, and that the appellant finally became dissatisfied, by reason of the character of material furnished by the respondent and the character of the work which she claimed he was doing, and the changes made in the original plans, and summarily ended the contractual relations between the appellant and respondent, by going into the house and taking possession of the same and, as she says,

throwing the appellant's tools out of the house. It is hardly necessary to say that a partnership cannot be terminated in this manner.

It is, however, technically contended by the appellant that, inasmuch as this was an action for a specific performance of a contract, and the court found that there was an obligation on the part of the respondent to pay the appellant $631, the performance of the contract could not be adjudged. It makes no difference what name may be given to an action under our system of pleading, whether in this case the action is denominated an action for specific performance or an action for an accounting, or for the dissolution of a partnership. The prayer in this case seems to be for all three. Our code provides what the pleadings shall consist of in an action, whether that action be termed an action at law or an action in equity. The complaint is a plain and concise statement of facts constituting a cause of action, with a demand for the relief which the plaintiff claims. But it does not necessarily follow that, if the plaintiff demands relief it is not entitled to under the statement of facts set out in the complaint, it will not be awarded any relief at all. Whatever relief it is entitled to under the facts stated, the court will award. Equity is frequently invoked for the very purpose of preventing a multiplicity of suits. The rules governing it are more flexible than the rules of law, and justice can be done the parties in one action. It is frequently said that equity needs no other court to finish its work, because of the rule that, when it once takes jurisdiction of a case, it will maintain jurisdiction to the end and adjudicate the rights of the parties. When a court of chancery acquires jurisdiction for any purpose, it will, as a general rule, proceed to determine the whole cause, although in so doing it may decide questions which, standing alone, would furnish no basis of equitable jurisdiction. Bispham's Principles of Equity (6th ed.), § 37. It is a well established rule that equity, having taken jurisdiction for one purpose, will retain it for others necessary to final settlement of all

matters involved in the litigaion between the parties growing out of and connected with the subject-matter of the suit, and will decide all incidental matters necessary to enable it to make a final determination of the whole controversy (1 Beach, Modern Equity Jurisp. § 21); the only limitation being that the matters adjudicated must be germane to, or growing out of, the matter of equitable jurisdiction, and not distinct legal rights not affected by adjudication of the equitable questions involved. This liberal doctrine has been followed by the courts, in all the code states especially, and also by this court in innumerable cases. We held, in *Dormitzer v. German Sav. etc. Society,* 23 Wash. 132, 62 Pac. 862, that the plaintiff in an equitable action would be accorded such relief as he was entitled to, even if the bill be given a wrong name. And in *Jordan v. Coulter,* 30 Wash. 116, 70 Pac. 257, that where defendant set up a contract and asked its specific performance by way of cross-complaint to an action against him for conversion, the court was warranted in decreeing a cancellation of the contract when it appeared to be nonenforcible, although plaintiff did not ask for such relief, under the rule that, when equitable jurisdiction attaches for any purpose, it extends to the whole controversy. And in accordance with this principle we said, in *McKay v. Calderwood,* 37 Wash. 194, 79 Pac. 629,

"We have frequently decided, in principle, that, under the provisions of the code, litigants cannot be expelled from the court at one door under the burden of accumulated costs, with the admonition to enter the court at another door with another accumulation of costs; but that, whatever rights the plaintiff has under the complaint, conceding its allegations to be true, will be tried out by the court, and the proper judgment in the cause rendered."

So that, under the allegations of this complaint, which were justified by the testimony, the court was authorized to enter the judgment which it did enter in the cause.

It is, however, contended by the appellant, and we think

with some show of reason, that the court should fix some definite time when the money due appellant should be paid; that inasmuch as it is not compulsory upon the respondent to pay at any time, it allows him to speculate in the value of the property, and that, if the property should become valuable hereafter, he could repay the appellant the $631 and have a deed for half of the same, or if he did not consider that the property was worth that much, there is nothing compelling him to make the payment. We think it would be nothing more than justice to compel the respondent to promptly comply with the judgment of the court in the matter of paying the amount found to be due from him, and the judgment will therefore be modified to the extent that the respondent shall, within thirty days from the filing of the remittitur in the lower court, tender or pay to the appellant the sum of $631 lawful money of the United States; and, if not so paid, execution shall issue for said amount in favor of appellant, to be collected in the manner provided by law, either out of other property of the respondent, or by the sale of the respondent's interest in the property in controversy. As so modified, the judgment is affirmed with costs to the respondent.

MOUNT, C. J., HADLEY, FULLERTON, RUDKIN, ROOT, and CROW, JJ., concur.

[No. 5902. Decided February 1, 1906.]

James S. Grant, *Appellant*, v. Michael M. Walsh, *Respondent*.[1]

Trial — Law of Case — Contract to Organize Corporation — Former Construction. Where W and G, two of the joint owners of a mine, entered into a contract whereby one of them agreed to organize a corporation, making a certain appropriation of the capital stock, "the remainder of the stock to be divided equally between said W and other owners than said G," and the supreme court on appeal has construed such contract to entitle the other owners to their proportion of the stock, it becomes the law of the case; and on a second appeal it cannot be objected that the contract was signed only by W and G, and that the other owners were not interested therein (Mount, C. J., dissenting).

Corporations—Contract for Organization—Division of Stock—Construction. Upon an action by the assignee of former owners of a mine to recover certain capital stock in a corporation, agreed by the defendant to be delivered to such owners as the purchase price of the mine, the defendant is entitled to a deduction of the stock which all of the parties had subsequently agreed should be set aside for the benefit of the company (Mount, C. J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 2, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

B. C. Mosby, for appellant.

H. S. Stoolfire, for respondent.

Root, J.—The appellant was the locator and owner of the Buckhorn mining claim, situated in Okanogan county. He sold an undivided one-half interest in the property to Patrick Donley and Gustavus A. Hutchinson, and these purchasers took into an equal partnership with themselves in said property John J. Stevens and Michael M. Walsh, this respondent. Some time thereafter, appellant and respondent executed the following instrument, concerning the other one-half interest:

[1]Reported in 83 Pac. 1113.

"Escrow Deed. Jas. Grant to M. M. Walsh.
"To Republic Bank:
"½ in. in Buckhorn M. claim, Myers Ck., Okanogan Co., Wash. Consideration $200—to be paid to said Grant on receipt by this bank of a satisfactory abstract of title to said mining claim, then this deed to be delivered to said Walsh; he is to incorporate the said Buckhorn Mining claim; the capital stock of said incorporation is not to exceed 1,000,000 shares of the par value of $1.00 per share, non-assessable; 150,000 shares of said capital stock is to be delivered to the said Jas. S. Grant as soon as corporation is complete; not less than 300,000 shares of said stock to be placed as treasury stock for the exclusive benefit of the corporation; the remainder of the stock to be divided equal between said Walsh and other owners other than said Grant; in case all agreements above mentioned are not well and truly carried out by said parties, then this deed to be void and of no effect. (Signed) M. M. Walsh, James S. Grant."

Thereafter respondent paid appellant the $200 mentioned in said instrument. Instead of incorporating a new company, it was agreed by all parties concerned that the mining claim should be transferred to the Monterey Gold Mining Company, already incorporated, and its stock divided in the same proportion as would have been that of the new company which it was originally intended to incorporate. One hundred and fifty thousand shares of the capital stock of the Monterey company was consequently issued and delivered to appellant, and 300,000 shares of said stock was placed in the treasury of the corporation for its benefit. Eighty-seven thousand five hundred was issued to Donley, Hutchinson and Stevens, each. Some time thereafter each of these three men made an assignment, conveyance, and bill of sale of all of his right, title, and interest in and to said corporation and its property over and above the said 87,500 shares of stock, received as aforesaid, said transfer, conveyance, and bill of sale being made to this appellant. The latter then demanded from respondent 150,000 shares of the capital stock, it being his claim that each one of the three men mentioned was entitled to 50,000

shares of stock over and above the 87,500 which he had received. All of the stock of the corporation had theretofore been issued to respondent, excepting the treasury stock and the stock issued to appellant and the three other men, as hereinbefore mentioned. Respondent refused to transfer to appellant said 150,000 shares demanded, or any portion thereof, claiming that each of said men had received the full amount due him when he received the 87,500 shares, and that said amount had been received and accepted by each of said men as the full amount due him, and that the conduct of each of said men and of appellant in connection with the corporation, and in the matter of voting their stock at stockholders' meetings, was such as to estop appellant, and each and all of said three men, from asserting any claim to any greater amount than the said 87,500 shares. The case must turn upon the construction to be given the instrument hereinbefore set forth.

Respondent claims that Donley, Hutchinson and Stevens, although referred to in said instrument, were not parties thereto, and had no interest whatever therein; that appellant was one party to said agreement and that respondent alone was the other party and beneficiary; that said three men referred to had no interest in, through, or under said agreement. Appellant maintains that each of said men had an equal interest with respondent in the property involved in said transaction. This case was before this court once before, and the opinion rendered is found in 36 Wash. 190, 78 Pac. 786. The construction by this court, placed upon the instrument hereinbefore set forth, seems to be in accordance with appellant's contention, and contrary to the interpretation contended for by respondent and accorded by the trial court at the last trial. This court having at that time placed an interpretation upon this contract, the same should have been accepted as the law of the case, and as binding upon the trial court.

We therefore think that appellant, under the contract as

heretofore construed and the assignments made by the three persons mentioned, became the owner of one hundred and fifty thousand shares of the capital stock, in addition to that already received. Of this amount we think, however, that he is rightfully entitled now to only one hundred thousand shares. Upon the 23d of February, 1899, all of the stockholders entered into an arrangement by which they set aside one third of their stock to be sold for the benefit of the company. Respondent then set aside ninety-five thousand as his pro rata share, this being one-third of all of his holdings, including the amount of stock in controversy herein. Appellant thereby set aside fifty thousand of his shares, being one-third of his original one hundred and fifty thousand only. As a matter of equity and justice, we think respondent should have credit for fifty thousand, which was a third of the stock involved herein.

The judment of the honorable superior court is reversed, with instructions to enter judgment in favor of appellant against respondent for the delivery of one hundred thousand shares of the stock; and if said stock cannot be delivered within a reasonable time, that appellant be given judgment for the value of said stock as of the present time, or as of any date appellant may elect since making his demand upon respondent for the delivery of said stock. Costs to appellant.

DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

MOUNT, C. J., dissents.

CROW, J., took no part.

[No. 5832. Decided February 2, 1906.]

Francis J. Roe, *Appellant*, v. Standard Furniture Company, *Respondent*.[1]

Trial — Practice — Judgment Non Obstante Veredicto — Statutes—Construction. Under Bal. Code, § 6521, providing that the supreme court may direct the proper judgment to be entered, and § 5056, providing that the trial court shall consider alleged error on motions for a new trial or for judgment notwithstanding a verdict, it is competent for the trial court, after a verdict for the plaintiff, to entertain a motion by the defendant for judgment *non obstante veredicto*, and to grant the same where it appears that the plaintiff has no possible right to recover.

Master and Servant—Collision of Furniture Vans—Contributory Negligence. The driver of a one-horse delivery wagon, injured in a collision with a heavy furniture van, which was backing up to the curb, is guilty of contributory negligence precluding a recovery, where it appears that he was, in the day time, driving along a wide street free from other obstructions, with his horse under control, and undertook, without reason or excuse, to drive between the curb and the large van, when as a careful driver he should have known that he could not do so, and when he might have stopped or passed in front.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1905, upon granting defendant's motion for judgment *non obstante veredicto*, dismissing an action for personal injuries sustained by a driver in a collision of furniture vans. Affirmed.

Vince H. Faben, for appellant.

Richard Saxe Jones, for respondent.

Crow, J.—Respondent, the Standard Furniture company, a corporation, was, on February 27, 1903, engaged in the furniture business in the city of Seattle, and used eight delivery wagons of various kinds and sizes, for which it employed drivers. Appellant, Francis J. Roe, employed by respondent, was the driver of a one-horse wagon, and was

[1]Reported in 83 Pac. 1109.

engaged in the occupation of delivering light furniture. One Hi Glass, of whom appellant complains, was also employed by respondent to drive a two-horse van or wagon, and deliver heavy furniture. In his complaint appellant made no reference to the fact that the relation of master and servant existed between respondent and himself, but alleged that on February 27, 1903, he was carefully driving a single team, consisting of a horse and wagon, on Madison street; that when he arrived at the intersection of Boylston avenue and Madison street, said large van, in charge of the agents and employees of respondent, was negligently, recklessly, and carelessly driven into, upon, and against the wagon in appellant's charge, with such force and violence as to wreck the same and throw appellant to the ground, causing him to sustain severe personal injuries; that said large van was controlled by a reckless and incompetent driver, and was operated by him in a reckless and incompetent manner, all of which was well known to respondent but unknown to appellant.

The answer denied said allegations of negligence, and pleaded the affirmative defenses of assumption of risk, negligence of a fellow servant, and contributory negligence, which defenses were denied by the reply. Upon the trial appellant made no attempt to show that Hi Glass, the driver of the van, was incompetent or that respondent had been negligent in employing him. At the close of the evidence respondent moved for a directed verdict, on the grounds, (1) that any negligence shown was that of appellant; (2) that if any other negligence was shown, which respondent denied, it was that of a fellow servant; and (3) that the case was one of assumption of risk on the part of appellant. The trial court denied the motion, and submitted the case to the jury, which returned a verdict in favor of appellant, assessing his damages at $3,000. Respondent immediately moved for a new trial, and by separate motion also asked for judgment notwithstanding the verdict, on the same grounds on which it had based its previous request for a directed verdict. The trial

court granted the motion for judgment, for the reason that, from the undisputed evidence, it appeared that appellant and Hi Glass were fellow servants. Thereupon judgment of dismissal was entered, from which this appeal has been taken.

In his assignments of error appellant has contended that respondent's motion for judgment notwithstanding the verdict should not have been entertained as it was not made in the manner or form required by law, and that the court erred in granting said motion after its prior denial thereof during the trial. In his argument appellant says:

"The motion for judgment *non obstante veredicto* was originally a motion for judgment upon the pleadings by the plaintiff, and at common law it was unknown for the defendant to share in this privilege. Originally, it was purely a motion by the plaintiff upon the record alone, and was a motion by the plaintiff addressed to the sufficiency of the defense, which, if admitted to be true, was no defense; and if the court upon investigation found the defendant's pleadings to be bad in form, but by amendment possibly could be made more complete, the court would order a repleader by the defendant; and this is the general rule today, where no statute is found to the contrary in the practice of the forum where the motion is made."

In support of this position appellant cites numerous authorities, including 11 Ency. Plead. & Prac., 917-921, on which he places special reliance, and further insists that no section of our code provides for a judgment *non obstante veredicto,* after a cause has been submitted to a jury and their verdict has been returned; that after verdict a defendant's only remedy is by motion for a new trial, and that the jury being the exclusive judges of the facts, when the evidence has once been submitted to them, the court can only grant a rehearing.

There is no doubt but that appellant's statement of the early common law rule is historically correct, but the practice in this state has been modified, and such modification is warranted by certain provisions of our code hereinafter men-

tioned. If the rule of practice contended for by appellant as pertinent to a motion for judgment *non obstante veredicto* be approved, then no available method would exist by which a trial court could correct its own mistake in erroneously submitting a case to the jury, other than that of granting a motion for a new trial, and such new trial would have to be granted even though it was indisputably apparent that a plaintiff had no possible right of recovery. Bal. Code, § 6521, provides:

"Upon an appeal from a judgment or order . . . the supreme court may affirm, reverse or modify any such judgment or order appealed from, as to any or all the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had . . ."

Assuming that the trial court erred in denying respondent's motion for a directed verdict, if it had thereafter entered final judgment upon the verdict returned, this court upon an appeal based on proper assignments of error, would not only order a reversal, but would also direct a final judgment dismissing the action. This being true, the trial court should be permitted to make the order without the necessity of an appeal. Bal. Code, § 5056, after providing that this court on appeal may review orders, rulings, or decisions to which no exceptions need be taken, and also those to which proper exceptions have been taken, contains the following language:

"And any such alleged error shall also be considered in the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion."

This court has repeatedly reviewed decisions of trial courts refusing to direct verdicts, and we are of the opinion that it

is the proper practice for a trial court, upon the hearing of a motion for judgment *non obstante veredicto,* to enter final judgment in favor of either party where it is warranted by the undisputed evidence. The facts being undisputed, it becomes the duty of the court to apply the law, there being no issue to submit to a jury. While the above rule of practice may not have been heretofore expressly announced by us, we have nevertheless in a number of cases put it into practical effect and recognized the principle above enunciated. *Larson v. American Bridge Co.,* 40 Wash. 224, 82 Pac. 294; *Dyer v. Middle Kittitas Irr. Dist.,* 40 Wash. 238, 82 Pac. 301; *Bancroft v. Godwin, ante* p. 253, 83 Pac. 189.

In *Larson v. American Bridge Co., supra,* the defendant challenged the sufficiency of the evidence, and moved for a dismissal of the action. This challenge being denied, a general verdict was returned in favor of the plaintiff, and special interrogatories submitted at the request of the defendant on the question of independent contractor were answered against the defendant's contention. A new trial being granted, the plaintiff appealed. This court having found that neither the general verdict nor the answers to the special interrogatories were supported by the evidence, speaking through Hadley, J., said:

"When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearly the case, and it was not error to set aside the findings and also the general verdict. Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it. *Bernhard v. Reeves,* 6 Wash. 424, 33 Pac. 873."

In *Dyer v. Middle Kittitas Irr. Dist.,* on a jury trial, the

plaintiff moved the trial court to discharge the jury, and render judgment in his favor, which motion being denied, a verdict was returned in favor of defendant. The plaintiff immediately moved for a new trial, and for judgment notwithstanding the verdict. Before the motions were passed upon, the motion for a new trial was withdrawn and the plaintiff's rights were submitted upon the motion for judgment, which the trial court denied, entering judgment upon the verdict. On appeal this court reversed the judgment of the trial court, and remanded the cause with directions to enter judgment for plaintiff for the amount due.

Was respondent entitled to a directed verdict and judgment of dismissal at the time defendant interposed its challenge to the sufficiency of the evidence? Without passing upon the defenses of fellow servant or assumption of risk, we think the final judgment was justified for the reason that appellant's evidence shows the accident to have been the direct result of his own negligence. Madison street, wide and well paved, running east and west, is intersected by Boylston and Broadway, parallel streets, running north and south one block apart, Broadway being east of Boylston. According to appellant's own evidence, he drove north on to Madison street from Boylston avenue, and proceeded east on the south side of Madison, traveling at a moderate gait, with his horse under full control. About the same time, Hi Glass, coming south on Broadway at a moderate gait, turned into Madison towards the west. Having a heavy piece of furniture to deliver at a house on the south side of Madison, a short distance from Broadway, he, Glass, drove directly across Madison and was in the act of backing his van up to the curb when the collision occurred. Without detailing the evidence, we find that appellant, without reason or excuse, attempted to drive between the large van and the curb, when as a careful driver he should have known he could not do so, and at a time when he, having full control of his horse, could either have halted or have driven out upon the street and passed in front of Glass's team

and van, there being no obstructions anywhere in the street. The accident occurred late in the afternoon, when appellant was making his last delivery, and he simply appears to have taken unnecessary chances in order that he might proceed more quickly to the completion of his day's labor. We fail to find any evidence showing negligence on the part of Glass. As said in *Larson v. American Bridge Co., supra,* respondent was entitled at the trial to have its challenge to the evidence sustained, and is still entitled to it. The trial court committed no error in sustaining respondent's motion *non obstante veredicto.*

The judgment is affirmed.

MOUNT, C. J., ROOT, RUDKIN, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

[No. 6017. Decided February 2, 1906.]

THE STATE OF WASHINGTON, *Appellant,* v. WALTER ADAMS, *Respondent.*[1]

CRIMINAL LAW—PLEADING—RAPE—INFORMATION—DUPLICITY. Under Bal. Code, § 7062, defining rape as (1) the carnal knowledge by force of a female over eighteen years of age, and (2) the carnal knowledge of a female child under the age of eighteen years, an information charging the offense by carnally knowing, by force, a female child under the age of eighteen years, states but one offense, since the act constitutes but a single offense whether one or all of the means specified in the statute were employed in its commission.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered November 6, 1905, dismissing a prosecution for the crime of rape, upon sustaining a demurrer to the information. Reversed.

R. M. Dye (E. A. Hesseltine, of counsel), for appellant.

Hibschman, Merritt & Merritt, for respondent.

[1]Reported in 83 Pac. 1108.

RUDKIN, J.—The information in this case charges that the defendant "On the 28th day of October, 1905, at the county of Lincoln, state of Washington, did unlawfully, feloniously and forcibly, and against her will ravish and carnally know Maud Stephey, then and there being, said Maud Stephey then and there being a female child under the age of eighteen years, to wit, of the age of 17 years." To this information the defendant demurred "on the ground that more than one crime is charged therein." The demurrer was sustained and the prosecuting attorney electing to stand on the information and refusing to plead further, judgment of dismissal was entered. From this judgment the state has appealed.

The statute defines the crime of rape as follows:

"A person shall be deemed guilty of rape who, (1) Shall, by force and against her will, ravish and carnally know any female of the age of eighteen years or more. . . . (3) Shall carnally know any female child under the age of eighteen years." Bal. Code, § 7062.

The appellant contends that this information charges but one crime under subdivision three of said section, and that the allegations of force and want of consent should be rejected as surplusage. The respondent on the other hand contends that the information charges the crime of rape under both the first and the third subdivisions, and that therefore two crimes are charged. It seems to us the demurrer was improperly sustained whichever view we adopt. If the contention of the appellant be sustained, it is manifest that the information charges but one crime, and in our opinion the same conclusion follows if we adopt the views of the respondent. The statute defines but one crime and prescribes but one penalty therefor. Where a statute provides that a crime may be committed in different ways or by different means, the act constitutes but a single offense, whether one or all of the ways and means be employed in its commission, and it is proper to charge in an information that the crime was committed in one of the ways or by one of the means specified in

the statute, or in all the ways and by all the means conjunctively. The rule is thus stated in 10 Ency. Plead. & Prac., 536:

"When a statute enumerates several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged cumulatively as one offense. And where the statute provides in the alternative several means by which the offense may be committed, or where the intent or purpose is set out in several aspects disjunctively, they may all be charged in setting out one and the same offense."

In *Fahnestock v. State,* 102 Ind. 156, 1 N. E. 372, the court held that:

"When a statute makes it an offense to do some one or another act, naming them disjunctively, either of which would constitute one and the same offense, and amenable to the same punishment, all the acts may be charged conjunctively in the one count as constituting a single offense."

In *People v. Harrold,* 84 Cal. 567, 24 Pac. 106, the court held that,

"An indictment for forgery which enumerates each one of the series of acts, either one of which constitutes such crime under the penal code, charges but one offense, since under said section they all constitute but a single offense."

In *People v. Gosset,* 93 Cal. 641, 29 Pac. 246, the court held that,

"An indictment charging that defendant 'did deal, play, carry on, and conduct the game of faro,' charges but one offense; Penal Code, § 330, inflicting a penalty on 'every person who deals, plays, or carries on, . . . or who conducts . . . any game of faro,'" etc.

In *People v. Leyshon,* 108 Cal. 440, 41 Pac. 480, the information charged the forging and uttering of a promissory note. A demurrer was overruled, and in affirming the judgment, the court said:

"Where, in defining an offense, a statute enumerates a series of acts, either of which separately, or all together, may

constitute the offense, all such acts may be charged in a single count; for the reason that, notwithstanding each act may, by itself, constitute the offense, all of them together do no more.' . . . The informaion charges but one offense, and the demurrer was properly overruled."

In *People v. Gusti,* 113 Cal. 177, 45 Pac. 263, the court said,

"Of course, an indictment or information must charge but one offense (Pen. Code, sec. 954), and if it charges more than one, it is subject to demurrer upon that ground. The question is, Did the information here charge two offenses? We do not think it did. It is a well-settled rule of law that 'when a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.' "

See, also, *State v. Newton,* 29 Wash. 373, 70 Pac. 31; *Crain v. United States,* 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; *Flohr v. Territory* (Okl.), 78 Pac. 565; *State v. Howard* (Mont.), 77 Pac. 50.

In the last cited case, the information charged the crime of robbery, "By means of force and putting in fear," and that the property was taken "from the person and possession and from the immediate presence" of the prosecuting witness. It was held that the information charged but one crime. Of course this rule does not apply if the different ways or means are repugnant to each other. If it be said of this case that the first subdivision of section 7062 applies only to females of the age of eighteen years or more, and the third subdivision to female children under the age of eighteen, the answer is that this information would in that event utterly fail to charge a crime under the first subdivision. We are satisfied that an information charging carnal knowledge of a female child under the age of eighteen years charges but a

single crime, regardless of the ways or means by which the act was accomplished.

The judgment is therefore reversed with directions to overrule the demurrer.

MOUNT, C. J., FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6020. Decided February 2, 1906.]

JOHN P. RECTOR, *Appellant,* v. BRYANT LUMBER & SHINGLE MILL COMPANY, *Respondent.*[1]

MASTER AND SERVANT—NEGLIGENCE—UNGUARDED CHIPPER—ASSUMPTION OF RISK—QUESTION FOR JURY. Upon a conflict in the testimony as to whether a saw, used for the purpose of chipping off the top part of the larger logs, could be advantageously guarded, under the factory act, the question is one of fact for the jury and not of law for the court, where there was ample testimony, if believed, to establish the fact that it could be guarded.

SAME—CONTRIBUTORY NEGLIGENCE. Where a workman comes in contact with unguarded machinery which he is not operating, the rule as to his contributory negligence is different from the rule where the machinery is under his immediate control.

SAME—KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a sawyer, who was injured in giving a signal by throwing up his hand, coming in contact with the revolving knives of a chipper over the sawyer's pit, is guilty of contributory negligence, is a question for the jury, where it appears that the distance from the floor to the chipper was seven or eight feet, that ten inches of sawdust had accumulated in the floor of the pit, but the foreman did not have the same removed when it was called to his attention at the noon-hour, and where the other methods of giving the signal were by a rope of which the plaintiff had no knowledge, or by leaving his position and going around the end of the log; since a person is not guilty of contributory negligence as a matter of law simply because he had previous knowledge of the danger.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 11, 1905, in favor of the

[1]Reported in 84 Pac. 7.

defendant, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries sustained by a sawyer through coming in contact with an unguarded chipper in a mill. Reversed.

McCafferty & Bell, for appellant.

Graves, Palmer, Brown & Murphy, for respondent.

RUDKIN, J.—On the 30th day of August, 1903, the plaintiff entered the employ of the defendant as a sawyer in its mill. As sawyer it was the plaintiff's duty to operate the log carriage and the large or principal saw used to saw the logs into lumber. The sawyer occupied a position in a small pit, about four feet square and two feet deep, and closed on three sides with boards, and on the fourth by the log carriage. There was no grating in the bottom or sides of this pit to permit of the escape of the sawdust and bark which accumulated therein through the operations of the mill. During the forenoon of the day on which the plaintiff was employed, the sawdust and bark accumulated in this pit to the depth of about ten inches. About the noon-hour the plaintiff called the attention of the mill foreman to this accumulation, but the same was not removed.

Above the log to be sawed, and slightly to one side of the pit in which the sawyer stood, a machine called a "chipper" was installed for the purpose of chipping off the top part of the larger logs in advance of the saw. The distance from the floor of the pit occupied by the sawyer to this chipper was seven or eight feet, and the sawdust in the bottom of the pit would reduce this distance to the extent of the accumulation of sawdust. Another employee, called the "setter," occupied a position on the opposite side of the carriage from the sawyer. When the log brought forward on the carriage reached the proper position, it was the duty of the sawyer to signal the setter to that effect. The signal was given by the plaintiff

in this instance by raising his left hand slightly above his head so that it could be seen by the setter over the log.

On the afternoon of the day on which the plaintiff was employed, a large log was brought into the mill and, as the log and carriage reached the desired position, the plaintiff raised his hand to signal the setter. As he did so, his hand came in contact with the revolving knives in the chipper above the log, causing the loss of three fingers. This action was brought to recover damages for the injuries so received. While other grounds of negligence are charged in the complaint, the only ground discussed on this appeal was the failure of the defendant to properly guard the chipper in question as required by the so-called factory act. Laws 1903, p. 40. At the trial the court below directed a nonsuit at the close of the plaintiff's case, and from the judgment of nonsuit this appeal is taken.

The appellant contends that the failure of the respondent to guard the chipper which caused the injury constituted negligence on its part, that the defense of assumption of risk does not obtain in such cases, and that the question of contributory negligence on the part of the appellant was for the jury. In answer to this, the respondent contends, (1) that the factory act has no application, because the chipper in question could not be advantageously guarded; (2) that the appellant was guilty of contributory negligence as a matter of law. In support of the first contention on the part of the respondent, it is urged that the chipper could not be guarded advantageously, and that the question whether it could or not, and of the applicability of the statute, was for the court and not for the jury. In support of this view counsel cite *Hoveland v. Hall Bros. Marine R. etc. Co., ante* p. 164, 82 Pac. 1090. In that case the court held, as a matter of law, that the shafting which caused the injury could have been guarded advantageously. Indeed, the principal contention of the appellant in that case was over the construction of the statute, and not over its application to the offending shafting.

Doubtless many cases will arise in which the court can say, as a matter of law, from the location of the machinery and the uses to which it is applied, that it can or cannot be advantageously guarded; but between these extremes there will necessarily arise a large class of cases where the question will be solely one of fact. The statute does not attempt to specify the particular machinery that shall be guarded, but declares that all machinery of a certain class shall be provided with proper safeguards where this can be done advantageously. If there is a conflict in the testimony as to whether a particular machine can or cannot be advantageously guarded, the question must be submitted to the jury under proper instructions. Under our system of jurisprudence there is no other way to determine the fact. In this case there was ample testimony, if believed by the jury, to establish the fact that the chipper in question could have been guarded advantageously, and if the jury so found, this would establish negligence on the part of the respondent as a matter of law, and preclude the defense of assumption of risk.

In support of the defense of contributory negligence, the respondent first contends that there were other ways in which the signal might have been given with entire safety. True, the appellant testified that he was informed after the injury that there was a rope by means of which the signal might have been given, but that he knew nothing of this prior to the injury; and further that he might have given the signal by leaving his position and going around the end of the log. Whether there was another practical method of giving the signal in question could not be decided on the record before us as a matter of law. The other ground of contributory negligence, and the one upon which the court below apparently based its ruling, was the fact that the appellant knew where the chipper was, knew that it was unguarded, and knew that if his hand came in contact with the revolving knives injury would result. In passing upon the motion for nonsuit, the court said:

"It must have been in a moment of forgetfulness that the plaintiff threw his hand up in contact with the knife. The law does not permit an operative who goes to work in a place of manifest danger to forget."

The rule thus announced is correct in a measure, but it has its limitations. If the court intended thereby that an employee in a mill, with his mind intent upon his work, must at all times remember at his peril every unguarded device in the mill about which he is employed, it placed too heavy a tax on the human intellect. If a workman by some overt act of his comes in contact with the machinery which he is operating and which is under his immediate control, he will ordinarily be held guilty of contributory negligence; but where, in the course of his employment, he comes in contact with unguarded machinery which he is not operating and which is not under his immediate control, a different rule applies. Counsel for respondent cite, *Olson v. McMurray Cedar Lumber Co.*, 9 Wash. 500, 37 Pac. 679; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385, and numerous other cases in this court where it is stated that "men, when they are working around dangerous machinery, must notice. Their faculties and senses are given them for the purpose of self-preservation, and they must exercise them to a reasonable extent." An examination of these cases will disclose the fact that the decisions were based in part, and in some cases almost exclusively, on the defense of assumption of risk, rather than of contributory negligence.

We think this case is controlled by the recent decisions of this court in *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, and *Erickson v. McNeeley & Co., ante* p. 509, 84 Pac. 3, both of which arose under this same statute. In the former case the employee had knowledge of the unguarded set screw, and knew that if his clothing came in contact with it serious injury would result. In the latter case the employee had knowledge of the unguarded saw and of necessity knew the consequences of his falling upon it.

In both cases the court held that the question of contributory negligence was for the jury. The rule is well established that a person is not necessarily guilty of contributory negligence as a matter of law simply because he had previous knowledge of the defect which caused the injury. *Kane v. Northern Cent. R. Co.*, 128 U. S. 91, 9 Sup. Ct. 16, 32 L. Ed. 339; *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, and cases cited.

On the authority of the above cases, the judgment is reversed and the cause remanded, with directions to set aside the judgment of nonsuit and award a new trial.

MOUNT, C. J., FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

ROOT, J., having been of counsel, took no part.

[No. 6080. Decided February 2, 1906.]

FREDERICK E. SWANSTROM *et al.*, *Respondents*, v. WASHINGTON TRUST COMPANY, *Appellant*.[1]

DEEDS—RECORD—PRIORITY. Under Bal. Code, § 4535, providing that deeds shall be valid as against *bona fide* purchasers from the date of their filing, it is not necessary in case of two deeds from the same grantor, that the subsequent deed to a *bona fide* purchaser be recorded before the first deed is recorded, in order to gain priority, since the statute does not so provide.

Appeal from a judgment of the superior court for King county, Hatch, J., entered November 10, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. R. Clise, for appellant, to the point that, to be valid as against any bona fide purchaser, a deed must be recorded,

[1]Reported in 83 Pac. 1112.

cited: *Fleschner v. Sumpter,* 12 Ore. 161, 6 Pac. 506; *Fries v. Null,* 154 Pa. St. 573, 26 Atl. 554; *Collins v. Aaron,* 162 Pa. St. 539, 29 Atl. 724; *Harding v. Allen,* 70 Md. 395, 17 Atl. 377; 24 Am. & Eng. Ency. Law (2d ed.), p. 122, and cases cited under note 5.

Peters & Powell, for respondents, cited: 24 Am. & Eng. Ency. Law (2d ed.), 140; *Miller v. Merine,* 43 Fed. 261; *Steele v. Spencer,* 1 Pet. 552; *DeCourcey v. Collins,* 21 N. J. Eq. 357; *Northrup's Lessee v. Brehmer,* 8 Ohio 392.

RUDKIN, J.—The question of priority between two deeds for the same property, from the same grantor, is the only question presented on this appeal. On the 5th day of December, 1903, one Angus W. Young conveyed certain property to the appellant, by warranty deed, to secure the payment of the sum of $8,000. This deed was not filed for record or recorded until the 10th day of June, 1904. On the 27th day of May, 1904, said Angus W. Young conveyed, by deed, a portion of the same property to the respondents, for a valuable consideration. The respondents purchased the property, paid the purchase price, and received their deed, without either actual or constructive notice of the prior deed to the appellant. This deed was not filed for record or recorded until the 7th day of March, 1905. On these facts the respondents contend that their deed has priority, because they were bona fide purchasers without actual or constructive notice of the prior unrecorded deed. The appellant, on the other hand, contends that its deed has priority because it was first in time and was first recorded.

The decision of this question depends upon our registration laws. Bal. Code, § 4535, provides that "all deeds, mortgages, and assignments of mortgages, shall be recorded in the office of the county auditor of the county where the land is situated, and shall be valid as against bona fide purchasers from the date of their filing for record in said office, and

when so filed shall be notice to all the world." It is not necessary that the subsequent conveyance should be first recorded in order to gain priority, unless the statute so provides. The rule is thus stated in Webb on Record of Titles, § 13:

"The statutes of nearly one-third of the states and territories provide that an unregistered conveyance shall be void as against a subsequent purchaser in good faith 'whose conveyance shall be first recorded.' Where the statute does not by such express terms make the rights of the subsequent purchaser depend on priority of record, such priority, or the want of it, is immaterial; and the courts have almost uniformly held that a subsequent conveyance for valuable consideration, taken without notice of a prior unrecorded one, prevails over such prior instrument, whether the later one be first recorded or not."

"Recordation is required for the protection of subsequent purchasers only. To require a subsequent conveyance of title to be recorded in order that a prior purchaser of the same property may be able to obtain information of its existence would not be in furtherance of the general design of these statutes, which was to protect purchasers from being undone by prior secret conveyances by making the means of obtaining information thereof available to that end. And so it is not necessary to his full protection in the absence of statutory provisions so requiring, that the subsequent purchaser record the instrument under which he claims before the recordation of the conveyance of the prior purchaser." 24 Am. & Eng. Ency. Law (2d ed.), 140.

The authorities cited to sustain the above statement of the law fully support the text.

Inasmuch as our statute does not require a prior registration of the subsequent deed in order to give it priority, the court below correctly ruled that such prior registration is unnecessary.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5963. Decided February 3, 1906.]

JOHN W. MACY, *as Administrator of the Estate of Matthew Green, Deceased, Respondent,* v. JOHN SULLIVAN, *Appellant.*[1]

APPEAL—BOND—SUPERSEDEAS OF OTHER THAN MONEY JUDGMENT. A judgment for the recovery of a sum of money and the cancellation of a deed, is one other than for the recovery of money, and an appeal and supersedeas bond without any order of court fixing the amount is insufficient to give jurisdiction of the appeal.

APPEAL—APPEALABLE ORDERS—DEFAULT ON FAILURE TO PLEAD OVER. No appeal lies from a judgment of default entered for failure to answer within the time fixed at appellant's request, after sustaining a demurrer to an affirmative defense, when no request was made to set aside the default.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered June 8, 1905, in favor of the plaintiff for damages and the cancellation of a deed. Appeal dismissed.

S. D. Griffith, for appellant.

Frank Reeves and *Reeves & Reeves,* for respondent.

PER CURIAM.—The judgment appealed from in this case is for $548.40 damages, and for the quieting of title to a certain tract of land by the return and annulment of a deed, given by mistake to the appellant by the respondent. The discussion of the merits of the appeal is obviated by the interposition by the respondent of a motion to dismiss the appeal and affirm the judgment, for two reasons: (1) That the judgment appealed from requires the performance of something other than, and in addition to, the payment of money, no order fixing the amount of a supersedeas bond ever having been made or entered by the trial court; and (2) that the judgment appealed from is not appealable.

It appearing in this case that the judgment did require

[1]Reported in 84 Pac. 601.

something in addition to the payment of money, viz., the returning of the deed, the case is brought squarely within the rule announced in *In re Drasdo's Estate,* 35 Wash. 412, 77 Pac. 735, where it was held that, upon an appeal from an order other than a judgment for the recovery of money, the amount of the bond to effect a stay of proceedings must be fixed by the court, and that a bond given as both an appeal and supersedeas bond, without any order of the court fixing the amount, is insufficient to give jurisdiction of the appeal. The record is silent in this case, as it was in the case just referred to, concerning the fixing of the supersedeas bond by the court, and in fact no claim is made that any such bond was fixed by the court.

As to the second proposition, it appears from the record that a demurrer was sustained to the appellant's affirmative defense to the complaint, and at his request he was given until April 29 in which to file a second amended answer; that he failed to file said pleading within the time allowed, or at all, and that on May 1, respondent moved for appellant's default for such failure; that such default was granted by the court, and no request was ever made to the trial court to set aside the default. Under such circumstances, no appeal lies. *Pacific Supply Co. v. Brand,* 7 Wash. 357, 35 Pac. 72; *Hall v. Skavdale,* 21 Wash. 203, 57 Pac. 807.

The appeal will be dismissed, a. d the judgment affirmed.

FULLERTON, J. (concurring)— I concur in the judgment on the ground last stated.

[No. 5696. Decided February 3, 1906.]

C. W. WALDRON, *Relator, Respondent,* v. THE CITY OF SNOHOMISH *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — REASSESSMENTS—ACTION TO COMPEL—COMPLAINT—SUFFICIENCY. In an action to compel a reassessment to pay warrants for the cost of a municipal improvement, the assessment for which had been adjudged void, the complaint is not open to objection from having alleged that the first assessment was duly passed, or in failing to allege that it was void, where it is alleged that it was "adjudged void" by the superior court.

SAME—PARTIES WHO MAY MAINTAIN ACTION. Any holder of warrants issued in payment of local improvements, the assessments for which are invalid, is entitled to plead any former adjudication holding the assessments void, whether a party to the former proceeding or not.

MUNICIPAL CORPORATIONS — OFFICERS — PROCESS — NOTICE TO SUCCESSORS. In a proceeding against the mayor and members of a city council, duly served with process in their official capacity, to compel the performance of an official act, the service and notice applies to and binds their successors in office.

MUNICIPAL CORPORATIONS—ACTIONS—HOLDERS OF WARRANTS—ESTOPPEL. The holders of warrants given in payment of a local improvement, the assessments for which are declared void, are not estopped from insisting upon a reassessment by the acceptance of interest or partial payments on their warrants.

SAME—MANDAMUS TO COMPEL ASSESSMENT. The holders of warrants given in payment of a local improvement, the assessments for which are declared void, are entitled to a reassessment by a proper ordinance, and where this is refused, mandamus lies to compel the city officials to make such reassessment.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered January 7, 1905, in favor of the relator, granting a writ of mandamus to compel the levy of a municipal reassessment for a local improvement. Affirmed.

W. H. Abel, A. M. Abel, and *John W. Miller,* for appellants.

Frank D. Nash and *Cooley & Horan,* for respondent.

[1]Reported in 83 Pac. 1106.

Root, J.—Relator instituted this proceeding to compel the city of Snohomish to make a reassessment, in order to pay certain special fund warrants held by him. From a judgment and decree directing such reassessment, this appeal is taken.

Appellants filed a motion to quash the writ, and later, a demurrer to the writ and application, said motion and demurrer being denied and overruled. Thereupon appellants made answer, presenting the following defenses: (1) Plea in abatement, alleging that the terms of office of G. L. Turner, as mayor, and F. S. Anderson and W. O. Dolsen, as councilmen, had expired, and that F. S. Anderson had succeeded Turner as mayor, and that H. D. James and Matt Albert were successors as councilmen to Anderson and Dolsen; (2) certain denials of allegations in the application and writ; (3) a plea of estoppel based on the acceptance by Palmer and Plaskett, the original owners of the warrants, of certain payments theretofore made; (4) a plea of laches to the effect that said Palmer and Plaskett and all subsequent holders, including relator, had full notice and knowledge of the alleged defects in the original assessment, and acquiesced therein for an unreasonable length of time.

The relator filed a reply controverting the affirmative defenses. Upon the trial, the relator moved the court to substitute as defendants E. L. Colburn, S. D. Dunn, and C. T. Mescher, in place of defendants F. M. Evans, C. D. Slater, and C. H. Crippen, whose terms of office as officials of said city had expired, which motion was granted. The original application alleged that the ordinance under which the work was done was "duly" passed. Appellants urge that, under this allegation, the relator could not be permitted to prove that the same was invalid. We think there is no merit in this contention. The application alleged that the ordinance, in an action in the superior court, was adjudged void and the proceedings thereunder held to be of no validity or effect. Appellants contend that this allegation was insufficient as it

does not show that said adjudication was "duly or regularly given or made," under the provisions of the statute, and does not state who were the parties thereto. We do not think this contention can be sustained. These were matters of evidence. Appellants claim that the petition alleges the original ordinance to have been "adjudged void," but does not affirmatively allege that it was actually void. This contention has nothing to commend it.

It is urged that the former adjudications, wherein said original assessment ordinance and a reassessment ordinance were held to be invalid, were binding only upon the parties and their privies. Under the statutory provisions for reassessments, any person holding warrants is entitled to plead any former adjudications holding void the assessments made to pay for the work on account of which his warrants were issued. The right is not confined to the parties to that particular action and their privies or successors in interest.

The original application and alternative writ ran against G. L. Turner, as mayor, and F. M. Evans and C. H. Crippen and C. D. Slater, as councilmen. Upon the trial the substitution was made as aforesaid. It does not appear that the writ was served upon the substituted parties, or that a demand was made upon them after coming into office, and it is urged by appellants that judgment could not be taken against them. We do not think this position tenable. The object of this proceeding was to compel the doing of an official act. The original defendants were sued in their official capacity, and the effect of any service and of any notice made upon them as such officials applied to and was binding upon their successors in office to the same extent as if they had continued in office. The successors assumed the offices held by their predecessors *cum onere*.

We do not find anything in the record or evidence touching the payments accepted by said Plaskett and Palmer which should be construed as constituting an estoppel as against them or their successors in interest. As the holders of war-

rants, they were entitled to receive such payments as the city saw fit to tender. That they accepted money from the city, collected under these ordinances, in payment of part of their warrants, furnishes no reason that would forbid a proceeding in mandamus to compel the city authorities to take appropriate action for collecting the money necessary to make the payment of the other warrants which they held.

The original ordinance providing for the improvement made was invalid. Several reassessment ordinances were subsequently adjudged by a court of competent jurisdiction to be void. This being true, the relator, as the holder of warrants given in payment for the improvement in question, was entitled to have a proper ordinance for reassessment passed by the proper city officials; and when they refused to do this, his right to a writ of mandate against them accrued. As bearing upon some of the questions involved herein, and especially as authority for a judgment and decree directing a reassessment, we may cite the following cases: *Abernethy v. Medical Lake,* 9 Wash. 112, 37 Pac. 306; *Frederick v. Seattle,* 13 Wash. 428, 43 Pac. 364; *Cline v. Seattle,* 13 Wash. 444, 43 Pac. 367; *State ex rel Hemen v. Ballard,* 16 Wash. 418, 47 Pac. 970; *Phillips v. Olympia,* 21 Wash. 153, 57 Pac. 347; *Port Angeles v. Lauridsen,* 26 Wash. 153, 66 Pac. 403; *Wasmund v. Harm,* 36 Wash. 170, 78 Pac. 777.

We think the judgment of the superior court should be affirmed, and it is so ordered.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5831. Decided February 6, 1906.]

In the Matter of the Estate of JEREMIAH W. FARNHAM, *Deceased.*

S. F. WILTSIE, *Appellant,* v. J. C. YOUNG, *Respondent.*[1]

EXECUTORS AND ADMINISTRATORS — LETTERS — ISSUANCE — REVOCATION. A creditor of an estate who agrees with the heirs to wait for his pay until the heirs return from the funeral of the deceased in a distant state, is not entitled to apply for letters of administration until such return, and letters issued to him should be revoked upon application of the heirs.

APPEAL AND ERROR—FINDINGS—FORM. Findings of fact and conclusions of law need not be separately stated in equitable or probate proceedings tried without a jury.

APPEAL—REVIEW—STATEMENT OF FACTS. An order revoking letters of administration will not be reviewed on appeal in the absence of a bill of exceptions or a statement of facts.

APPEAL—REVIEW—DISCRETION—APPOINTING SUCCESSOR TO ADMINISTRATOR. Where letters of administration are properly revoked, the discretion of the trial court in appointing a successor will not be reviewed on appeal.

Appeal from an order of the superior court for King county, Frater, J., entered May 18, 1905, in favor of the petitioner, after a hearing on the merits, revoking letters of administration, upon application of next of kin. Affirmed.

Vince H. Faben, for appellant.

Wiley, Herr & Bayley, for respondent.

RUDKIN, J.—On the 20th day of February, 1905, J. W. Farnham died intestate in King county leaving an estate therein subject to administration. On the 4th day of March, 1905, the appellant Wiltsie filed his petition in the superior court of said county praying that he be appointed administrator of said estate. On the 16th day of March, 1905, an order was regularly entered, granting the prayer of said peti-

[1]Reported in 84 Pac. 602.

tion and appointing the appellant as such administrator. The heirs and the next of kin of the deceased consisted of a brother, two sisters, and a son of a deceased brother. One of the sisters resided with the deceased in the city of Seattle up to the time of his death. The other heirs were nonresidents of the state.

On the 9th day of March, 1905, the two sisters and the nephew of the deceased prepared a petition asking for the appointment of John C. Young as administrator of said estate, said Young being a son-in-law of Nancy S. Boyd, a sister of the deceased. This petition was prepared at San Francisco, California, whither the parties had gone to attend the funeral of the deceased. On the return of the respondent Young from California with said last mentioned petition, he discovered that the appellant had been appointed administrator of the estate during his absence. The respondent thereupon filed a petition, and afterwards an amended petition, asking for the revocation of the letters issued to the appellant, and that the respondent be appointed administrator in his stead.

The appellant appeared in opposition to this petition, in obedience to a citation served upon him, and a demurrer interposed by him to the amended petition was overruled. A hearing was thereupon had, and the court made an order granting the prayer of the petition, revoking the letters issued to the appellant, and appointing the respondent administrator in his stead. From this order an appeal has been prosecuted to this court.

In addition to the foregoing facts, the amended petition averred:

"That a few days after the death of said Jeremiah W. Farnham, your petitioner, as representing the heirs of said deceased, was attending to the settlement of some of the debts which had been incurred by the intestate during his last illness, and that while so doing he met the administrator appointed herein, Dr. S. F. Wiltsie, for the first time; that at

this meeting your petitioner asked for said Wiltsie's bill, to which said Wiltsie replied that he did not have it; that if your petitioner would go to the office of said Wiltsie, he Wiltsie, would furnish a bill, which petitioner did; that at that time said Wiltsie presented a bill against said estate for Fifty Dollars ($50) for services rendered; thereupon and at said first conversation with said Wiltsie, your petitioner offered to pay said amount, but said he would prefer if said Wiltsie would wait until he returned from the funeral, which would be in about two or three weeks from that time. Thereupon said Wiltsie replied that he was willing to wait until your petitioner returned to Seattle; that relying upon said conversation and the promise of said Wiltsie, your petitioner postponed the payment of said claim until he should return to the city of Seattle; that the claim of said Wiltsie is the only claim outstanding and unpaid now held against said estate except such as have been paid by your petitioner and such as are held by the heirs of the deceased so far as your petitioner is advised."

If these facts are true, we think the court was fully warranted in revoking the letters of administration issued to the appellant. His right to administer upon the estate arose solely from the fact that he was a creditor of the deceased. If he entered into the agreement set forth in the amended petition this would constitute a waiver of his right to administer upon the estate, at least until the expiration of the time at which the respondent agreed to return and pay the bill, and his conduct in violating this agreement and obtaining his own appointment as administrator while the respondent and next of kin were attending the funeral of the deceased in a distant state should not be countenanced by the courts. The demurrer to the amended petition was properly overruled.

The appellant further objects to the order of removal on the ground that the findings of fact and conclusions of law made by the trial court on the hearing of the petition for removal were not separately stated. This requirement of the statute only applies to actions at law tried without a jury. It does not apply to equitable proceedings nor by analogy to

probate proceedings. There is no statement of facts or bill of exceptions, and in the absence of the testimony, this court will not review the order revoking the letters of the appellant.

It is further contended that the heirs and next of kin have no right to nominate or request the appointment of a third person as administrator of the estate. This question does not arise in this case. We hold that the letters of the appellant were properly revoked, and will not review the discretion of the trial court in appointing his successor.

We find no error in the record and the judgment is affirmed.

MOUNT, C. J., CROW, DUNBAR, ROOT, HADLEY, and FULLERTON, JJ., concur.

[No. 5587. Decided February 7, 1906.]

JEFFERSON FORD, *Appellant*, v. C. H. KIMBLE *et al.*, *Respondents*.[1]

CONTRACTS — PERSONAL SERVICE—MAINTENANCE—BREACH—RESTORING CONSIDERATION. An obligation of a son to support his parents in consideration of a conveyance of land is personal and cannot be assigned without consent of the parents, and upon failure of the son to perform the contract, the right of the parents to be restored to their property immediately vests.

SAME—RIGHTS OF HEIRS. Where premises were conveyed to a son, in consideration of which he agreed to support his parents during their lives, upon the death of the son without performance of the contract the equitable title to the property revests in the parents, and the heirs of the son acquire no interest therein.

SAME—VOLUNTARY CANCELLATION—EXECUTION OF NEW AGREEMENT. Where a son agreed to support his parents in consideration of the conveyance of premises, the parties may thereafter agree to cancel the contract and enter into another agreement whereby the son was to support his mother, and a daughter was to support her father, and each was allotted a certain portion of the premises in consideration thereof, and the heirs of the son can raise no objection thereto.

[1]Reported in 84 Pac. 414.

Appeal from a judgment of the superior court for Skagit county, Joiner J., entered January 18, 1905, in favor of the defendants, upon sustaining a demurrer to the complaint, dismissing an action to vacate a judgment. Affirmed.

McLean & Wakefield, for appellant.

Hurd & Brickey, for respondents.

MOUNT, C. J.—This action was brought by the appellant, upon arriving at the age of majority, to vacate a judgment of the superior court of Skagit county, awarding certain real estate to Clara Kimble and Henry Kimble, and certain other real property to David Ford, upon certain conditions, which judgment was rendered on February 12, 1895, in an action in which appellant was a party during his minority. A demurrer to appellant's complaint was sustained, upon the ground that the complaint did not state a cause of action. Appellant elected to stand upon the allegations of the complaint, and the action was dismissed.

The facts, as stated in the complaint, are, in substance, as follows: In the year 1881, Levi Ford and Rebecca Ford, his wife, were the owners of a farm of the value of $7,000, in Skagit county. They also owned farm produce, stock, and farming implements of about the value of $2,000. At that time Levi Ford was eighty years of age and Rebecca seventy-five years. They had two children, a son and a daughter, both married. Clara, the daughter, was married to Henry Kimble. David Ford, the son, was married to Caroline Ford. On December 1, 1881, Levi and Rebecca Ford entered into an agreement with their son David Ford, by the terms of which agreement they deeded all their real estate and gave all their personal property to David, in consideration that he should maintain, support, and care for them during the remainder of their natural lives. In describing the real estate a mistake was made in the deed, so that the description recited that the land was in section 20. It should have recited

that the land was in section 25. On the same day David Ford and wife, in pursuance of the said agreement, entered into a lease with their father and mother, leasing the farm back to them for the period of their natural lives, for a nominal consideration.

David Ford and wife went into possession of the farm, and lived with their father and mother thereon until the year 1889, when Caroline, wife of David Ford, died intestate, leaving surviving her a minor son, Jefferson Ford, the appellant, and a daughter, Alice Ford, aged about six months. Within a few months after the death of Caroline Ford, Alice Ford, the minor daughter, died. In the year 1892, the mistake was discovered in the deed from Levi and Rebecca Ford to David Ford. In July of 1892, Levi and Rebecca Ford made a quitclaim deed of their farm to their daughter Clara Kimble and her husband, correctly describing the land.

Thereafter David Ford and his minor son Jefferson Ford, this appellant, represented by a guardian ad litem appointed by the court for that purpose, brought an action against Levi and Rebecca Ford and Clara Kimble and Henry Kimble, to set aside the quitclaim deed on the ground of fraud, and to reform the deed from Levi and Rebecca Ford to David, made in the year 1881. Henry Kimble and wife answered the complaint in that action, denying generally all the allegations of the complaint. Levi Ford and wife answered denying the allegations of the complaint upon information and belief, and by way of affirmative defense alleged that they were aged and infirm and unable to read and write at the time the deed was made, and that they entered into an agreement with said David Ford, by the terms of which David Ford and wife were to have possession of the real estate and personal property and should cultivate the said real estate in a careful manner, and should care for and maintain their parents during their natural lives, and upon their death should own and possess both the real estate and personal property; that said David Ford, taking advantage of the age and in-

firmities of his parents, and without their knowledge or consent, prepared the lease and deed hereinbefore mentioned; that David Ford in violation of his agreement converted all the personal property to his own use, allowed the farm to grow up to weeds and brush, and has failed, neglected, and refused to care for and support his father and mother, and that after the death of Caroline, their daughter-in-law, they were compelled to provide their own means of subsistence. The answer alleged other misconduct on the part of David Ford, and prayed for a cancellation of the deed. A reply was filed, denying the affirmative matter set out in the answer of Levi and Rebecca Ford.

Upon a trial the court found that defendants Levi and Rebecca Ford, on December 1, 1881, in consideration that they should in the future be properly cared for and maintained for the remainder of their natural lives, executed and delivered a deed of their farm to said David Ford; that in pursuance of the agreement said David Ford leased back to his father and mother the said premises for their natural lives; that a mutual mistake was made in the description of the property; that defendants Henry and Clara Kimble knew all the facts and did not acquire the said quitclaim deed of July 20, 1892, in good faith for value. The court also found, "that the defendant Levi Ford will not longer live on said premises with the plaintiff David Ford, but desires to live elsewhere, and that defendant Rebecca Ford will not live with any other person but her son David Ford." From these findings the court concluded that the deed from Levi and Rebecca Ford should be reformed, to show the true consideration thereof and also the correct description of the property, and that the quitclaim deed to Henry and Clara Kimble should be cancelled. A decree was entered accordingly, which recited among other things as follows:

"It is further decreed that said deed be reformed so as to include and contain the agreement made by the parties thereto at said time, which agreement and said deed is hereby re-

formed to read that the party of the second part shall during the natural lives of defendants Levi M. Ford and Rebecca Ford properly feed, clothe, care for, and maintain the said Levi M. Ford and Rebecca Ford during their natural lives, and at such place as they shall choose to live, and in such circumstances as their station in life reasonably requires, and to pay for their funeral expenses at the time of their deaths; and that the said David Ford be and he is hereby required to enter into and give a sufficient bond in the sum of $500 to be approved by the court, conditioned that he will faithfully execute said trust as in said deed contained; that he will during the natural lives of said Levi M. Ford and Rebecca Ford properly maintain, care for, and support them at any place they may choose to live, and in such circumstances as is consistent with their station in life, and that upon failure to so properly maintain, care for, and support them, then said deed shall become void and said property revert to said Levi M. Ford and Rebecca Ford. The clerk of this court is hereby appointed a commissioner to execute and deliver said deed to said plaintiff, in case of refusal of said Levi and Rebecca Ford to do so on demand of said plaintiff or his attorneys."

This decree was entered on July 16, 1894. Thereafter, on the 30th day of July, 1894, Levi M. Ford filed a petition in said cause, alleging that Henry Kimble and Clara Kimble had for a period of four months furnished him with clothing and provisions of the reasonable value of $100; that the said Levi M. Ford had no money or property to pay for the same, and that said David Ford had refused to pay therefor; that David Ford had failed to file a bond as required by the decree above stated; and that delinquent taxes to the amount of $849.67 stood against the land, that the said land was then being advertised for sale to pay such taxes, and that David Ford refused to pay such taxes. The prayer was that the deed to David Ford be cancelled for failure to perform his agreement as set out in the decree above stated. Counsel for the respective parties to the original proceedings aforesaid appeared upon the hearing of the petition, and stipulated in open court for a division of the real estate between David

Ford and Clara Kimble, David agreeing to take a part of the land and support his mother, and Clara agreeing to take another part and support her father, and a decree was entered to that effect on February 12, 1895. This is the decree which is sought to be reviewed in this proceeding.

The complaint shows that said Levi M. Ford and Rebecca Ford are now dead, and that the appellant came of age April 1, 1903. Several very interesting questions are presented in appellant's brief, but the view we take of the question relating to the interest of appellant avoids the necessity of consideration of other questions presented. The complaint shows that the property conveyed by Levi M. Ford and wife to their son David in 1881 was conveyed under the condition and in consideration of their maintenance and support during the remainder of their natural lives. The obligation of David, the son, to his aged parents was personal and could not be avoided or assigned to any other person without the consent of the parents; and upon the failure of the son to render the service or perform the contract upon which the conveyance rested, the right of the parents to be restored to their property immediately vested. *Payette v. Ferrier,* 20 Wash. 479, 55 Pac. 629, and cases cited. See, also, *Payette v. Ferrier,* 31 Wash. 43, 71 Pac. 546.

The equitable title to the property, therefore, remained in the parents, while the legal title stood in the name of the son who was a trustee for their benefit. Upon the death of the son's wife, the contract for support of the parents was not changed. The son was still bound to perform the conditions of the contract according to the terms thereof. If he neglected to do so, the legal title was subject to be defeated and to be re-vested in the parents. This might be accomplished by an action for that purpose or by a voluntary conveyance by the son. In other words, until the conditions of the contract had been performed and the fee of the real estate had passed to the son during his marriage, no inheritable interest vested in

his wife, and therefore upon her death the minor son acquired no interest either in the contract or in the land.

The minor son having no interest, it follows that he was not a necessary party to the action to reform the deed, and that his father, David Ford, could make such disposition of the contract as was agreeable to the parties to it. The fact that Jefferson Ford, the appellant, was made a party to the action to reform the deed did not change the status of the deed when reformed, nor the relations of any of the parties to it. The deed, when it was reformed by an order of the court, stood as the contract which was made in 1881 between Levi and Rebecca Ford and their son David. The obligations of all these parties were the same then as before the reformation of the deed. David might relinquish his rights thereunder by failure to perform his duty or by voluntary surrender. The complaint shows that shortly after the decree reforming the deed, David and his aged parents did agree to cancel the contract and voluntarily entered into a new contract, by the terms of which David was to support his mother and Mrs. Kimble was to support her father, and each was allotted a certain described portion of the farm in consideration thereof. This they had a perfect right to do without consulting the minor son of David.

For the reason that the appellant had no independent interest in the litigation or in the contract out of which the litigation grew, he cannot now be heard to complain of any errors therein. The demurrer was properly sustained. The judgment is therefore affirmed.

DUNBAR, HADLEY, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 5931. Decided February 7, 1906.]

MARY CAREY, *Respondent*, v. W. F. HAYS, *Appellant*.[1]

BILLS AND NOTES—CONSTRUCTION. A promissory note for a certain sum, with interest, reciting that "this note is given as a security of said C. [the payee] with an assignment of scrip," to be issued for public lands within six months, and providing that the assignment was to be returned if the scrip was not issued, and the scrip to be returned upon payment of the note, should be construed as meaning that the note and assignment of scrip were given as security for the money borrowed, and not that the note was given as security for the assignment of the scrip in case the same was not issued, under the liberal rule of construction of pleadings first assailed at the trial.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 9, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Fred Page-Tustin (W. F. Hays, of counsel), for appellant.
Blaine, Tucker & Hyland, for respondent.

DUNBAR, J.—This is an action brought by the respondent against the appellant to recover the sum of $500 and interest, alleged to be due on a promissory note set out in the complaint. The cause was tried by the court without a jury, and resulted in a judgment in favor of respondent.

The principal contention is as to whether or not the complaint states a cause of action. The allegations of the complaint, omitting the formal parts, are as follows:

"That, at Seattle, Washington, on June 2, 1896, for a valuable consideration to him in hand paid, the said defendant made, executed and delivered to the plaintiff his certain promissory note in writing, bearing date on that date, which said promissory note is in words, letters and figures following, to wit:

[1]Reported in 84 Pac. 581.

" 'Seattle, Wash., June 2, 1896. Six months after date I promise to pay to the order of Mary Carey five hundred ($500) dollars gold coin of the United States of America, with interest thereon at the rate of one per cent per month from date. This note is given as a security of said Miss Mary Carey with an assignment of scrip made and executed to her by me this day, directed to the commissioner of public lands for the sum of one thousand dollars to be delivered to said Miss Mary Carey when the same shall have been issued by the state to me, my heirs or assigns, within the said six months from this date; and if not so issued by the state within said time, then said Mary Carey is to return said assignment or order for issue of scrip from the state, and on the payment of this note, according to these terms, said order and assignment to be fully canceled and discharged. (Signed) W. F. Hays.'
wherein and whereby the said defendant promised and agreed to pay the sum of $500 according to the terms and conditions of said promissory note, and then and there delivered said promissory note to the plaintiff, who is now the owner and holder thereof, and no part of the same has been paid." [Demand for judgment.]

No demurrer was interposed to this complaint, but answer was made admitting the execution of the instrument set up in paragraph one of the complaint, but alleging that, under the terms of a certain contract entered into between the defendant and the state, he was entitled to the issuance of certain certificates or scrip for land, and that in conjunction with the giving of the note, he had directed the commissioner to execute and deliver to the respondent $1,000 in certificates when the same should be issued by the state to him under the aforesaid contract; that concurrently therewith, and as a guaranty on the part of the appellant that the contract referred to would be performed, and that the said scrip would be issued and delivered to the respondent, he executed the note which was set up in the complaint; that the contract for the tide land filling had not yet been performed, nor the scrip issued by the state of Washington; but that the contract was yet in force, and that it would in due course of time be

performed and the scrip issued to the respondent; denied that he was indebted to the respondent in the sum of $500, or any other sum; and asked for a dismissal of the cause with costs. The material part of the reply was to the effect that the note was not given as a guarantee for the fulfillment of the contract. The sufficiency of the contract was not assailed until after the issues were made up and the witnesses for the respondent introduced, when the appellant moved the court for a nonsuit, upon the ground and for the reason that the evidence was insufficient to support a verdict in favor of respondent, and that the complaint did not state facts sufficient to constitute a cause of action against the appellant.

A more liberal construction will always be given to a pleading that is assailed after issue joined and trial had than will be when the sufficiency of the pleading is raised upon a demurrer. We think there was sufficient in this complaint, especially supplemented by the testimony, to state a cause of action, if, indeed, it is not sufficient upon its face. The accompanying announcement, that this note is given as a security of Miss Mary Carey, with an assignment of scrip, etc., does not sustain appellant's contention that the note was given to respondent as security for the assignment of the scrip spoken of. The court evidently, and we think properly, construed the instrument as meaning that the note and assignment were given as security for the payment of the money borrowed, viz., the $500. The assignment was brought into court by the respondent and tendered to the appellant in the case. This the respondent had a right to do under the terms of the agreement, which further provides that, upon the payment of the note, the order and assignment should be canceled and discharged; all tending to show that it was the intention of the parties to the contract that the assignment or order for the scrip was to be held simply as security for the payment of the note.

No error was committed by the court in overruling the

appellant's motion to dismiss. The judgment seems to be right and is therefore affirmed.

MOUNT, C. J., CROW, FULLERTON, HADLEY, RUDKIN, and ROOT, JJ., concur.

[No. 5968. Decided February 7, 1906.]

JAMES STANGAIR, *Appellant,* v. JOHN ROADS, *Respondent.*[1]

BOUNDARIES—ESTABLISHMENT—EVIDENCE. The monuments established by the official surveys control the field notes and other proof of the location of a government corner, but in the absence of other evidence the field notes control.

SAME—EVIDENCE—FIELD NOTES. Where a government corner is lost, and the surveyor who established the corner fifty years ago is unable to explain the many material discrepancies between his own field notes and those returned to his superior officer, the certified copy of the field notes recorded in the surveyor general's office should have greater weight and will not be overturned by evidence of the field notes of the surveyor.

SAME—APPOINTMENT OF COMMISSIONERS—DISCRETION. The appointment of commissioners under Bal. Code, § 5668, to establish a disputed boundary, rests in the discretion of the trial court, and is not subject to review on appeal.

SAME—EVIDENCE—DECLARATIONS—COMPETENCY. In an action to establish a disputed boundary, declarations of the appellant's deceased father are inadmissible.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered February 18, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to establish a lost boundary. Affirmed.

H. C. Leiser and *E. M. Green,* for appellant.

A. L. Miller and *W. W. Sparks,* for respondent.

RUDKIN, J. — This was a proceeding to establish a lost boundary, under Bal. Code, § 5667. A determination of the

[1]Reported in 84 Pac. 405.

issue between the parties depends solely upon the true location of the northeast corner of the John Stangair donation claim, it being admitted that the respondent owns the land described in his complaint lying immediately to the north of the north line of said donation claim, and the appellant the adjoining land lying immediately to the south of said line. The testimony in the case is uncertain rather than conflicting. The respondent contends that the northeast corner of the Stangair donation claim was originally located 6.54 chains north of the northwest corner of the Wm. F. Crate donation claim; whereas the appellant claims that the original and true location was 9.61 chains north of the northwest corner of said Crate donation claim. The monument established by the United States surveyor at the corner in dispute would be the best and primary evidence of the true location, and would control over field notes or any other class of proof. *Cadeau v. Elliott,* 7 Wash. 205, 34 Pac. 916; *Hubbard v. Dusy,* 80 Cal. 281, 22 Pac. 214; *Knoll v. Randolph,* 3 Neb. (Unof.) 599, 92 N. W. 195; *Clark v. Thornburg,* 66 Neb. 717, 92 N. W. 1056.

It is conceded that all trace of the original monument and survey has been obliterated, and no witness, excepting the surveyor Van Vleet, whose testimony will be referred to presently, pretended to be able to identify the location of the original corner. The respondent offered in evidence a certified copy of the field notes on file and of record in the Surveyor General's office of this state, and it is apparently conceded that a survey made in accordance with these filed notes will establish the disputed corner 6.54 chains north of the northwest corner of the Crate donation claim, as contended for by the respondent.

"Of course, if the location of the corners by the original government survey can be ascertained, they are not to be moved, but will control all other surveys; but when the marks of the government survey have been obliterated, and the location of the corners by that survey cannot be estab-

lished by witnesses who know where they were located, resort must be had to other evidence, and, in the absence of any other proof, the measurements indicated by the field notes of the government survey must control." *Clark v. Thornburg, supra.*

Such is the case here. The appellant on the other hand offered in evidence the field notes kept by the deputy United States surveyor, who made the original survey. These field notes were received in evidence, over objection. According to them, it is apparently conceded that the disputed corner would be located 9.61 chains north of the northwest corner of the Crate donation claim, as contended for by the appellant. In fact, the controversy over the boundary in question seems to have arisen largely by reason of a survey made from these notes some ten years ago. On cross-examination, the deputy surveyor testified,

"That he had no independent recollection of how he made the survey and could not remember as to the location of the corners other than as shown by his notes. That in running north on the west line of the Stangair D. L. C. he made a mistake and ran too far north and found he was getting too much land, and so dropped back about 3 chains and established the northwest corner of said claim. That he cannot tell or explain why the notes in the Surveyor General's office run in an opposite direction from the notes kept by himself, unless he had reversed it in making his report, nor could he explain why the distances were different from those certified by him, nor could he tell why the bearing trees were not the same at either corner, as to distance, or bearings, in the government notes and those used by witness, nor could he tell or explain why he had run the north line 2.61 chains north of a true east line as shown by his field notes in going a distance of 14.50 chains, from the northwest corner of said Stangair D. L. C., but that his field notes showed that he had done so; that he had not been on said premises since he ran the lines in 1856 and knew nothing about the corners or the witness trees at the present time. That he had no personal recollection of any corner or bearings made at that time except as he refreshed his memory from his own notes."

This survey was made some fifty years ago, and inasmuch as the witness cannot explain the discrepancies between his own field notes and those returned by him to his superior officer this court will not undertake to do so. It might be suggested, however, that the witness may have found it necessary to make some changes in the survey before reporting to the surveyor general, and that such changes were not indicated on the field notes retained by him. In any event such testimony as this cannot be permitted to overturn the official record of the survey on file in the proper office. From the entire testimony in the case we are satisfied that the court was fully warranted in establishing the corner in accordance with the field notes from the surveyor general's office, in the absence of any other satisfactory proof.

It is assigned as error, that the court should have appointed commissioners to ascertain and fix the boundary, as prescribed in Bal. Code, § 5668. The appointment of such commissioners rests in the discretion of the trial court, and its ruling on that question is not subject to review here. The exclusion of the declaration of the appellant's father as to the boundary line, the father being dead, is also assigned as error. One witness was permitted to testify to such declarations, and even if they were competent, they were so general in their character that they could not affect the result on the merits. The showing of newly discovered evidence in support of the motion for a new trial was wholly insufficient and the motion was properly denied.

There is no error in the record, the judgment is affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5777. Decided February 8, 1906.]

JOHN G. KULZER, *Respondent*, v. E. B. SIMONTON, *Appellant*.[1]

SALES—REPLEVIN—REMEDY OF VENDOR FOR FRAUD—PURCHASE BY THIRD PARTY—NOTICE—ADVANCEMENT OF FREIGHT CHARGES—CONDITIONAL JUDGMENT. Replevin for lumber sold will lie, where the lumber was sold to a dealer who is hopelessly insolvent and who had no intention of paying for the same, without knowledge on the part of the vendor of such insolvency and fraudulent intent, and where the lumber was resold or turned over by the dealer to another to whom the dealer was indebted and who knew of the dealer's insolvency and fraudulent intent, and who paid nothing thereon except the freight charges and a credit on the indebtedness; but in such case the plaintiff will be compelled to refund the freight charges advanced as a condition for recovery.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered March 27, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of replevin. Modified.

Gallagher & Thayer, for appellant, contended, *inter alia*, that the mere fact of insolvency does not authorize the vendor to rescind the sale and maintain replevin for the goods. *Alder & Sons Clothing Co. v. Thorp*, 102 Wis. 70, 78 N. W. 184; *Illinois Leather Co. v. Flynn*, 108 Mich. 91, 65 N. W. 519; *People ex rel. Ellis v. Healy*, 128 Ill. 9, 20 N. E. 692, 15 Am. St. 90; *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148; *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352; *Klopenstein v. Mulcahy*, 4 Nev. 296; *Bell v. Ellis*, 33 Cal. 620; *Hotchkin v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376; *Smith v. Smith, Murphy & Co.*, 21 Pa. St. 367, 60 Am. Dec. 51; *Burrill v. Stevens*, 73 Me. 395, 40 Am. Rep. 366; *Chamberlain v. Hoggs*, 1 Gray 172; *Zucker*

[1]Reported in 84 Pac. 582.

v. Karpeles, 88 Mich. 413, 50 N. W. 373; *Armstrong v. Lewis,* 38 Ill. App. 164; *Bidault v. Wales,* 19 Mo. 36, 59 Am. Dec. 327; *Kelsey, Roberson & Co. v. Harrison,* 20 Kan. 143; *Labe v. Lewis Bremer's Sons,* 167 Pa. St. 15, 31 Atl. 342; *Farwell v. Hanchett* (Ill.), 9 N. E. 58; *Boggs v. Barry,* Fed. Cas. No. 1,402; *Commonwealth v. Eastman,* 1 Cush. 189, 48 Am. Dec. 596; *Reeder Bros. Shoe Co. v. Prylinski,* 102 Mich. 468, 60 N. W. 969. There was no evidence that the fraudulent intent, if any, preceded the sale. *Starr v. Stevenson,* 91 Iowa 684, 60 N. W. 217; *Burrill v. Stevens, supra.* Presumptions do not run backwards; proof that a thing once existed, does not tend to prove that it previously existed. *Chandler v. Jamaica Pond Acqueduct Corp.,* 122 Mass. 305; *Windhaus v. Bootz,* 92 Cal. 617, 28 Pac. 557; *Nevers v. Hack,* 138 Ind. 260, 37 N. E. 791, 46 Am. St. 380; *State v. Dexter,* 115 Iowa 678, 87 N. W. 417; *Redding v. Godwin,* 44 Minn. 355, 46 N. W. 563; *Martyn v. Curtis,* 67 Vt. 263, 31 Atl. 296; *Jarvis v. Vanderford,* 116 N. C. 147, 21 S. E. 302; 1 Elliott, Evidence, § 110, note 137 and cases cited. The following cases cited by respondent sustain our contention: *Talcott v. Henderson,* 31 Ohio St. 162; *Davis v. Stewart,* 8 Fed. 803; *Morrow Shoe Mfg. Co. v. New England Shoe Co.,* 57 Fed. 685; *Skinner v. Michigan Hoop Co.,* 119 Mich. 467, 75 Am. St. 413; *Taylor v. Mississippi Mills,* 47 Ark. 247, 1 S. W. 283; *Burrill v. Stevens, supra.*

John C. Kleber, for respondent, contended, among other things, that a purchase of personal property by one who does not intend to pay for the same is fraudulent. *Lee v. Simmons,* 65 Wis. 523, 27 N. W. 174; *Kearney Milling etc. Co. v. Union Pac. R. Co.,* 97 Iowa 719, 59 Am. St. 434; *Gainesville Nat. Bank v. Bamberger, Bloom & Co.,* 77 Tex. 48, 19 Am. St. 738; *Belding v. Frankland,* 8 Lea 67, 41 Am. Rep. 630; *Donaldson v. Farwell,* 93 U. S. 631, 23 L. Ed. 993; 2 Mechem, Sales (Am. ed.), p. 577, note 4; *Pike v. Weiting,* 49 Barb. 314. An undisclosed insolvency is presumptive evi-

dence of intent not to pay. *Talcott v. Henderson,* 31 Ohio St. 162, 27 Am. Rep. 501; *Morrow Shoe Mfg. Co. v. New England Shoe Co.,* 57 Fed. 685, 24 L. R. A. 417; *Skinner v. Michigan Hoop Co., supra; Davis v. Stewart,* 8 Fed. 803; *Le Grand v. Eufaula Bank,* 81 Ala. 123, 60 Am. Rep. 140. It is always evidence of such intent. 2 Mechem, Sales, §§ 903, 906; *Dalton v. Thurston,* 15 R. I. 418, 2 Am. St. 905; *Edson v. Hudson,* 83 Mich. 450, 47 N. W. 347; *Reager v. Kendall* (Ky.), 39 S. W. 257. Concealment of insolvency with no reasonable expectation of paying renders the sale fraudulent and subject to rescission. *Fechheimer v. Baum,* 37 Fed. 162, 2 L. R. A. 153, note; *Jaffrey v. Brown,* 29 Fed. 477; *Rawdon v. Blatchford,* 1 Sandf. Ch. 344; *Powell v. Bradlee,* 9 Gill & J. 142; *Johnson v. Monell,* 2 Abb. App. Dec. 470; *Davis v. Stewart,* 8 Fed. 803; *Taylor v. Mississippi Mills, supra; Oswego Starch Factory v. Lendrum,* 57 Iowa 573, 10 N. W. 900, 42 Am. Rep. 53; *Des Farges v. Pugh,* 92 N. C. 31, 53 Am. Rep. 446; *Houghtaling v. Hills,* 59 Iowa 287, 13 N. W. 305; *Brower v. Goodyer,* 88 Ind. 572. A mortgagee or creditor taking goods in security or payment of an antecedent debt is not a bona fide purchaser. *Woonsocket Rubber Co. v. Loewenberg Bros.,* 17 Wash. 29, 48 Pac. 785, 61 Am. St. 902; *Hurd v. Bickford,* 85 Me. 217, 35 Am. St. 353; *Phenix Iron Works v. McEvony,* 47 Neb. 228, 53 Am. St. 527; *Barnard v. Campbell,* 58 N. Y. 73, 17 Am. Rep. 208; *Cox Shoe Co. v. Adams,* 105 Iowa 402, 75 N. W. 316; *McGraw v. Solomon,* 83 Mich. 442, 47 N. W. 345; *Work v. Jacobs,* 35 Neb. 772, 53 N. W. 993; *Sleeper v. Davis,* 64 N. H. 59, 6 Atl. 201, 10 Am. St. 377; *Henderson v. Gibbs,* 39 Kan. 679, 18 Pac. 926; *Eaton v. Davidson,* 46 Ohio St. 355, 21 N. E. 442; *Dinkler v. Potts,* 90 Ga. 103, 15 S. E. 690; *Peninsular Stove Co. v. Ellis,* 20 Ind. App. 491, 51 N. E. 105; 2 Mechem, Sales, §§ 901, 924.

Root, J.—This is an action to replevin lumber, bought by defendant Coburn from respondent, and subsequently sold to

appellant. Respondent manufactured the lumber at Valley, Washington. Coburn was a dealer in lumber in Spokane. Appellant was a contractor and builder in the last mentioned city. Coburn by letter ordered two carloads of lumber from respondent, both of which were shipped to him at Spokane. Coburn was absent from Spokane when the lumber arrived. His agent, one Powell, went to appellant and told him that the lumber had arrived, but that there was no money with which to pay the freight charges. Appellant advanced $69.75 to pay said freight charges, and one carload of lumber was turned over to him, and also a portion of the other carload. Coburn was owing appellant at this time. He paid Coburn nothing for the lumber, excepting the $69.75 advanced for freight charges, but gave him credit for $280 on the existing indebtedness.

Respondent alleged that Coburn was hopelessly insolvent at the time he ordered the lumber, and had no intention and no reasonable expectation of being able to pay therefor, and maintains that appellant knew, or should have known, of Coburn's insolvent condition, and of the fact that he had not paid for said lumber. The value of the two carloads of lumber was $359.75. The case was tried before the court without a jury and findings of fact and conclusions of law, and judgment for the return of the lumber, or for $280, in the alternative, were made and entered in favor of respondent. Appellant excepted to the principal findings of fact and contends that the judgment, from which he appeals, was erroneous.

The court found that Coburn was hopelessly insolvent, and concealed his insolvency from respondent, who had no knowledge thereof, and that he had no reasonable expectation of being able to pay for said lumber, and that he bought it with fraudulent intent not to pay for the same, and found that appellant parted with nothing of value in consideration of getting said lumber. The decision of the case must turn largely upon the intent of Coburn and the knowledge, actual

or constructive, of appellant of the circumstances involved. These were questions of fact depending upon the evidence. It would probably serve no good purpose to analyze and discuss the evidence adduced. While it is not as satisfactory as might be desired, nevertheless, we think it sustains the material facts found by the trial judge, and was sufficient to sustain the judgment with the following exception. The $69.75 freight bill was a charge which it was necessary to pay before Coburn or appellant or respondent could get possession of the lumber from the railway company. We do not think that respondent was entitled to be placed in a better position than he would have been had appellant not taken the lumber. The latter having been transported from Valley to Spokane, the respondent had the benefit of this transportation, which rendered the lumber that much more valuable where delivered.

The case will be remanded to the superior court with the following instructions: If, within thirty days from the date of the filing of the remittitur, the respondent shall pay into the registry of the court for the benefit of the appellant the sum of $69.75, then the judgment of the lower court shall stand affirmed. If said amount is not so paid within said time, then the superior court shall enter an order and judgment dismissing the action. Said deposit of $69.75 shall not be delivered by the clerk of the court to appellant until the lumber shall have been delivered to respondent. If said lumber has been removed or in any manner dissipated so that the same cannot be delivered to respondent, the latter may withdraw the $69.75, giving appellant credit for said amount upon the judgment of $280, as entered by the superior court. Neither party shall recover costs in this court.

MOUNT, C. J., DUNBAR, CROW, FULLERTON, RUDKIN, and HADLEY, JJ., concur.

[No. 6004. Decided February 9, 1906.]

THOMAS C. HOPKINS *et al., Appellants,* v. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, *Respondent.*[1]

INSURANCE—ENDOWMENT PROVISION—WAIVER—PAYMENT OF PREMIUMS AFTER MATURITY—FRAUD—EVIDENCE—SUFFICIENCY. There is no waiver of a clause in an insurance policy allowing the insured to receive an endowment of $1,000 after the lapse of ten years, nor any estoppel on the part of the insured to claim the benefit of such clause, in lieu of continuing the policy for life by payments, where it appears that the insured were old people, inexperienced in business, and upon demanding the endowment they were put off from time to time on the ground that assessments provided for in the policy for such payment must be made, and where, relying upon fraudulent representations that payments must be continued by them to keep the policy in force, they made such payments; since waiver requires full knowledge of one's rights, and the intent must be unequivocal and clearly proven.

SAME—RECOVERY OF PREMIUMS ERRONEOUSLY PAID. Payment of premiums on an insurance policy, induced by fraudulent representations by the company, while the insured were making demand for the right to an endowment, will not amount to a waiver of such right; and the payments may be recovered, even if negligently made.

SAME—FRAUD—ESTOPPEL TO ASSERT WAIVER. An insurance company that fraudulently induces payment of premiums ordinarily amounting to a waiver of a clause for the payment of an endowment, is estopped to assert such waiver or to claim that the insured had elected not to take advantage of the endowment clause.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 11, 1905, upon sustaining a demurrer to plaintiff's amended complaint, dismissing an action on an endowment clause of a policy of life insurance. Reversed.

Wardall & Wardall and *Frank C. Park,* for appellants.

Rufus J. Burglehaus and *Emmett N. Parker,* for respondent.

DUNBAR, J. — The complaint alleges, in substance, that Thomas C. Hopkins, one of the appellants in this case, en-

[1] Reported in 83 Pac. 1019.

tered into a contract of life insurance with the defendant corporation, by the terms of which plaintiff agreed to pay promptly all dues and assessments which should be levied by defendant, and at the end of ten years, to wit, on March 18, 1898, he was, in the event of his survival, to surrender his certificate and receive $1,000 upon an endowment policy; that a clause in the contract provided that, in the event of the death of the insured before the ten years had elapsed, Carrie Hopkins, one of the appellants here, was to receive $2,000; that the plaintiff performed all and every condition of his contract, etc., and at the termination of the period of ten years, surrendered to the defendant his policy, and demanded the sum due thereon; that the defendant at once returned the contract to plaintiff, requesting him to keep it until notified by defendant that the proper assessment had been made upon the certificate holders, and a sufficient sum had been raised by such assessment to pay said plaintiff's certificate; that a number of times after said first demand, covering a period of more than two years thereafter, the plaintiff demanded that defendant pay said sum of $1,000; that at each of such times said defendant held out and represented to plaintiff that the funds had not been raised therefor, and that defendant would notify plaintiff when sufficient funds had been raised by such assessments, and when it would be ready to pay such certificate; that the necessary steps were being taken and had by defendant for the collection of the assessments necessary to pay plaintiff; that defendant has never notified plaintiff that it had completed the assessment for the payment of said policy, and was ready to pay the same; that plaintiffs relied upon such representations of defendant that it was taking the necessary steps to collect the funds to pay said policy, and that it would notify plaintiffs when the funds had been collected on the assessments; and that by reason of the holding out of such promises of an amicable settlement, plaintiffs delayed the bringing of suit

on said policy till this time; that defendant has not paid said sum of $1,000, or any part thereof, and that the same is now due and owing to these plaintiffs; that on or about the 1st day of May, 1898, the defendant demanded, in writing, of these plaintiffs the sum of $8.45, as and for a payment to it for the purpose of keeping said policy in force, and such written demand required plaintiffs to make such payment to defendant on or before the 1st day of May, 1898, and stated that in default of such payment the said policy would become void and all payments theretofore made thereon would become forfeited to defendant; that at such times these plaintiffs were old people, and were then visiting at the city of Dawson, Yukon territory; that they were inexperienced in business affairs; that they were ignorant of, and did not understand the purport and meaning of, the terms of their said policy and their rights thereunder; that they were also ignorant of the manner of levying assessments by defendant upon the holders of policies, and knew nothing of the internal management of insurance companies; that they were ignorant and unacquainted with the amount of proceeds on hand with said company at the time said demand was made, and also the amount necessary to be raised in addition thereto to cover their policy; but that the defendant, well knowing the facts in regard to these plaintiffs, and the policy which they held, unlawfully demanded, extorted, charged, took, and received from these plaintiffs the sum of $8.45, on the pretense that it would cancel and forfeit such policy if such payment was not made; and believing, on account of such representations, that the policy would become forfeited and lost to these plaintiffs if said payment was not made, and in order to avoid the expense of litigation and save themselves from unnecessary charges and expenses, they were coerced by the said defendant to make such payment; that under the same circumstances other payments were made (which are set forth in the complaint); that none of such sums were ever justly due or owing to said defendant at any time, or at all, but that

all such sums were unlawfully extorted and exacted from plaintiffs. The prayer is for judgment against the defendant, on their first cause of action, in the sum of $1,000, with interest thereon at the rate of six per cent per annum from the 18th day of March, 1898, together with costs and disbursements. On the second cause of action, judgment is prayed for the different sums paid to the defendant, as alleged in the first cause of action, up to the time of the commencement of this suit. Demurrers were interposed to both causes of action, and were sustained on the ground that no cause of action was stated in the complaint.

The policy, which is the basis of the complaint and made a part thereof, provides unequivocally for an endowment policy and for an endowment fund, expressly providing that, if the holder of the certificate shall keep the same good by promptly paying all the dues and assessments, and survive until the 18th day of March, 1898, he shall at said date surrender the certificate to the association and receive the sum of $1,000 from the endowment fund. It then proceeds to state how the endowment fund shall be supplied, by assessments at certain rates, etc., which explains the allegation made in the complaint that the plaintiffs' right of payment under the endowment provision was postponed until the endowment fund should be supplied by assessment.

Whether the contract provides for any other character of payment, it is not necessary in this case to determine, but, conceding that there was a choice of two rights given by the terms of the contract, we think there was no waiver of the right to receive the $1,000 provided for in the policy at the expiration of ten years, and which was demanded by the appellants. The case is argued here on the proposition alone that the complaint did not state facts sufficient to constitute a cause of action, and the action of the court in sustaining the demurrer must have been upon the theory of waiver or estoppel, that the appellants, by proceeding after the ten years had expired, to pay the regular premiums on the policy,

had elected to accept the conditions of the policy, which provided for the payment of $2,000 at the death of the assured.

But we are of the opinion that the court did not place a proper construction upon this complaint. A waiver is defined to be the intentional relinquishment of a known right, and there can be no waiver unless the person against whom the waiver is claimed had a full knowledge of his rights. 29 Am. & Eng. Ency. Law, 1093, and cases cited. It was held, in *Hamilton v. Home Fire Ins. Co.*, 42 Neb. 883, 61 N. W. 93, that knowledge of the existence of a right and the intention to relinquish it must concur to create an estoppel by waiver. In this case, if the allegations of the complaint are true—and they must be taken to be so, those which are well pleaded—the assured did not have a full knowledge of his rights; for according to the representations made to him by the insurance company, it was necessary for him to make these payments during the time the company was making arrangements to pay him the amount of the policy, in order that the policy should not become void. It was upon this representation that he acted.

Neither will waiver be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act clearly proven. 29 Am. & Eng. Ency. Law 1105. These people were old, inexperienced in business affairs, and anxious to keep their policy from becoming void; and this state of ignorance, together with the representations which were made to them by the company's agent, was the cause of the payments which were relied upon as a waiver of their rights under the endowment provision of the contract and an acceptance of the other provisions of the policy. It was held, in *Fulton v. Metropolitan Life Ins. Co.*, 19 N. Y. Supp. 660, that the failure to read a contract would not bar relief when, if relief was afforded, no injury would happen to others, and particularly when the person to whom money was paid by mistake knew, or ought to have known, that he was not entitled to receive it. How much stronger is this case, where the in-

surance company not only knew that it was not entitled to receive this money, but did receive it through its affirmative misrepresentation of facts.

Neither can it be inferred that a party waives his right under a contract by making a payment thereunder, while at the same time making demand for his rights. *Griffith v. Newel* (S. C.), 48 S. E. 259. It is also announced in 29 Am. & Eng. Ency. Law, 1095, that the validity of a waiver requires that it shall have been made intentionally and voluntarily; that voluntary choice is of the essence of waiver, and the view that waiver is a legal result operating upon a certain state of facts, independent of intent, has been declared to be without foundation. The same authority, on page 1096, further declares, in accordance with the authorities cited, that the existence of an intent to waive is a question of fact, and must be made clearly to appear.

It was said by this court in *David v. Oakland Home Ins. Co.*, 11 Wash. 181, 39 Pac. 443, where the parties were endeavoring to adjust a loss, that so long as the insured was given the right to suppose that the question of adjustment was an open one, he had the right to assume that the condition of the policy as to the time for the commencement of an action thereon had been waived by the company, and such waiver would continue until, by some definite action on its part, the company had notified the insured of the rejection of its claim, after which he would have a reasonable time in which to commence an action upon the policy. As sustaining this contention, see, also, *Birge v. Browning*, 11 Wash. 249, 39 Pac. 643; *Elliott v. Puget Sound etc. S. S. Co.*, 22 Wash. 220, 60 Pac. 410; *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414.

Waiver as applied to insurance is identical with estoppel. May, Insurance, § 505, says that,

"'Estoppel' and 'waiver,' though not technically identical, are so nearly allied, and, as applied in the law of insurance, so like in the consequences which follow their successful application, that they are used indiscriminately by the courts."

A waiver to be an estoppel must be voluntary, and it is settled that a voluntary payment is only made with full knowledge of the circumstances upon which it is demanded, and without artifice, deception, or fraud. According to the allegations of the complaint, these payments were not made with knowledge of all the circumstances, but upon the representation that they were necessary to keep the policy from lapsing or becoming void. It was a mistake, if mistake at all, of material facts, and it is a general rule that money paid under a mistake of material facts can be recovered back, although there was negligence on the part of the person making the payment, and especially if the payee was in any way responsible for the mistake.

But the principle of estoppel should be applied in this case to the respondent. It is one of the fundamental principles of law, based upon a universally recognized principle of morals, that one should not be allowed to take advantage of his own wrong, and according to the complaint, the payments were made by reason of false representations made by the respondent, inducing the fear on the part of the appellants that their policy would be rendered void if such payments were not made; and although some years have elapsed since the demand for these payments was made, during which time they have continued, yet they were induced in the first instance by the wrongful act of the respondent, at which time it informed the appellants that it would notify them when it was ready to pay the policy, and not having so notified, and having by its wrongful acts compelled them to commence making these payments, the law will not too closely compute the time within which the payments should cease, but will presume that the later payments were made with the same understanding, and by reason of the same representations, that the earlier ones were made.

The complaint, in our judgment, stating a cause of action, both as for the recovery of the endowment and of the money paid through mistake and misrepresentations, the judgment

will be reversed, and the cause remanded with instructions to the lower court to overrule the demurrer to the complaint.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5995. Decided February 9, 1906.]

C. M. MILLER, *Appellant,* v. THE CITY OF SEATTLE, *Respondent.*[1]

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—ENACTMENT OF ORDINANCE PROVIDING FOR PAYMENT—COSTS. Where, after an appeal from the dismissal of an action to recover an excessive assessment, the city passed an ordinance providing for repayment of the assessment, the appeal will be dismissed, with costs to the appellant, on the ground that the controversy has ceased.

Appeal from a judgment of the superior court for King county, Frater, J., entered November 6, 1905, in favor of the defendant, denying a petition for a writ of mandamus to compel the return of a pro rata portion of the excess of a local improvement fund, upon sustaining a demurrer to the affidavit. Appeal dismissed.

C. M. Miller, for appellant.

Scott Calhoun, for respondent.

ROOT, J.—The city of Seattle levied a special assessment to pay for paving certain streets. When the work was completed, it was ascertained that said assessment produced an excess of about $19,000 over and above what was necessary to fully pay the cost of the improvement. Appellant was one of the owners of property specially assessed. He instituted this proceeding to compel the city, by mandamus, to refund to him the pro rata portion of said excess which should come to him. The trial court sustained a demurrer to his complaint, on the ground that the action was not commenced

[1]Reported in 84 Pac. 583.

within the time required by the city charter, and the proceeding was dismissed. From the judgment of dismissal an appeal was taken. After the appeal had been perfected, the respondent city duly enacted an ordinance, wherein and whereby it was provided that all property owners within the district covered by the assessment referred to should be entitled to receive their pro rata portion of the excess on hand.

Respondent moves to dismiss the appeal herein, (1) for the reason that the amount involved is less than $200; (2) for the reason that the controversy, on account of the enactment of said ordinance, has ceased. Appellant urges that the last ground is not well taken, for the reason that the city cannot pay him under this ordinance as long as the judgment of the lower court remains unreversed. We do not think this position tenable. By passing the ordinance referred to, the city acknowledged its obligation to pay appellant and all other property owners within said district the amounts respectively which they had paid in excess of what was necessary to do the work. Having so done, and then having moved to dismiss this appeal upon the ground that the effect of said ordinance was to provide payment and satisfaction of appellant's claim, the city would be estopped to hereafter deny its obligation to pay appellant said amount. We think the appeal must be dismissed upon the second ground mentioned.

This disposition necessitates our consideration of the question of costs. It appears that this appeal was taken prior to the passage of the ordinance wherein and whereby the city made provision for the payment of appellant's claim. We think appellant is entitled to such costs as he incurred up to the date that said ordinance was approved by the mayor, to wit, December 28, 1905. The appeal will be dismissed, and costs in this court taxed in favor of appellant.

MOUNT, C. J., CROW, HADLEY, DUNBAR, and RUDKIN, JJ., concur.

[No. 5932. Decided February 9, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. A. A. ARMSTRONG, *Appellant*.[1]

CRIMINAL LAW — ERROR CORAM NOBIS — PETITION — SUFFICIENCY. An application for a writ of *coram nobis* is insufficient where the writ is sought to set aside a conviction of murder because of the commission of perjury of a juror upon his *voir dire*, not discovered until after the decision of the case on appeal, where the petition was not verified by the applicant, nor supported by affidavits; since the qualifications of the juror had been adjudicated, and the writ cannot be employed to set aside verdicts on account of perjury.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 6, 1905, upon the motion of the state, dismissing a petition for a writ of error *coram nobis* to set aside a judgment of conviction of the crime of murder. Affirmed.

W. H. Abel, for appellant, cited: *Heasley v. Nichols*, 38 Wash. 485, 80 Pac. 769; *Thompson v. Sharp*, 17 Neb. 69, 22 N. W. 78; *Commonwealth v. McElhaney*, 111 Mass. 439; *Oglesby v. Attrill*, 12 Fed. 227.

E. E. Boner, for respondent, contended, *inter alia*, that the writ is not available in this state since there is a remedy by appeal or motion for new trial. *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658; *Collins v. State*, 66 Kan. 201, 71 Pac. 251, 97 Am. St. 361, 60 L. R. A. 572. It issues only upon proper application. *Smith v. Kingsley*, 19 Wend. 620; *State ex rel. Davis v. Superior Court*, 15 Wash. 339, 46 Pac. 399. The record cannot be contradicted, or adjudicated issues of fact corrected. *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Collins v. State, supra*, 97 Am. St. 366, note; 5 Ency. Plead. & Prac., 29, 34; *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975; *Johns v. McLester* (137 Ala. 283, 34 South.

[1]Reported in 84 Pac. 584.

174), 97 Am. St. 27, 36, note. Relief from a conviction cannot be had upon the ground that proof can be made that another person committed the crime, or newly discovered evidence establishing innocence. *Howard v. State,* 58 Ark. 229; *Collins v. State, supra,* 97 Am. St. 368, note 5d; *Dobbs v. State,* 63 Kan. 321, 65 Pac. 658; *Bigham v. Brewer,* 4 Sneed 432.

Root, J.—The appellant was informed against in the trial court on a charge of murder in the first degree, and a verdict finding him guilty thereof returned. Motion for a new trial was made and denied, and judgment entered on the verdict. An appeal from the judgment was taken to this court, where an affirmance was had. Thereafter appellant filed in the superior court a petition for a writ *coram nobis,* alleging therein that one Robert Lowry, who was one of the members of the jury before whom appellant was tried, and who on his *voir dire* had stated that he was not acquainted with appellant, had never seen nor heard of him before, and had not formed nor expressed any opinion, and had no impression respecting the guilt or innocence of the defendant, and was entirely free from bias and ill will, and knew of no reason why he could not sit as a juror, had a few days prior to said trial stated, in the presence of one May Lamb, that if he sat upon the trial of said cause as a juror he would see to it that appellant was hung, meaning thereby that he would insist on convicting appellant of murder in the first degree, and that said Lowry then and there expressed great animus and bias against appellant; that neither appellant nor his attorney knew of the said statements at the time the said juror was examined upon his *voir dire;* that said juror was actuated by strong personal bias, and entertained the fixed opinion at said time that this appellant was guilty and should be convicted of murder in the first degree—all of which was unknown to appellant or his attorney until long after the trial and entry of judgment, and after the termination of the appeal in the supreme court;

that defendant did not receive a fair and impartial trial on account of these matters.

To this petition the prosecuting attorney interposed a motion to dismiss upon the following grounds:

"(1) The court is without authority in law to issue said writ; (2) the said petition is not verified according to law; (3) the petition does not set forth facts sufficient to warrant or upon which to base the issuance of said writ, or to grant the relief prayed for in the petition."

This motion was sustained by the trial court, and the petition dismissed. From the order and judgment of dismissal, this appeal is taken.

The petition is neither signed nor verified by appellant, but bears the signature and verification of his attorney. Neither is it accompanied by the affidavit of the said May Lamb, referred to therein, nor by the affidavit of any other person or persons claiming to have heard any of the statements alleged to have been made by said Lowry. Coming in this form at so late a day, we think the petition was entirely insufficient, and that the order of the court dismissing the same was not error. *Reid v. Hoffman,* 6 Heisk. (Tenn.) 440; *Collins v. State,* 66 Kan. 201, 71 Pac. 251, 97 Am. St. 361 and notes, 60 L. R. A. 572; *Dobbs v. State,* 63 Kan. 321, 65 Pac. 658. Under our statutes and practice, it may be possible that occasion might arise where a writ *coram nobis* could be properly granted; but such occasions must be very rare, as provision is made to afford relief by other means in most cases. It has been held, and we think it to be the general rule, that the writ will not be issued to correct an error involving a question that has been adjudicated. 5 Ency. Plead & Prac., 29, 34. In this case the question of the qualification of Lowry as a juryman was adjudicated. He was questioned and cross-questioned upon his *voir dire* as to his qualifications, and was duly accepted as a juryman. That the writ cannot be employed to set aside verdicts and judgments on account of perjury seems to be well established.

State ex rel. Davis v. Superior Court, 15 Wash. 339, 46 Pac. 399. There would seem to be no greater reason why the writ should issue in a case where a prospective juryman is alleged to have answered falsely as to his qualifications.

We do not think the petition presented in this case justified the issuance of the writ. The judgment of the superior court is affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5903. Decided February 14, 1906.]

WILLIAM F. PROSSER, *Appellant,* v. GEORGE L. FINN, *Respondent.*[1]

PUBLIC LANDS — ENTRY — WHO MAY MAKE — EMPLOYEE IN LAND OFFICE. Under U. S. Rev. Stat., § 452, a special timber agent appointed by the general land office is prohibited from making an entry on public lands, and his entry of lands under the timber culture act is void.

SAME — CONTEST — DECISION OF LAND DEPARTMENT — WHEN CONCLUSIVE—REDRESS IN COURTS. A ruling of the land department upon the cancellation of a public land entry is conclusive where no rights have been denied the applicant, and no error has been committed in deciding upon the legal rights involved.

SAME—ILLEGAL ENTRY—IMPROVEMENTS — SUBSEQUENT ENTRYMAN TRUSTEE. One who files on public land after the termination of a contest in the land department resulting in the cancellation of an earlier entry by another, is not a trustee of the title for such unsuccessful applicant, by reason of knowledge of his improvements on the lands, where such improvements were made with no legal claim to the land.

Appeal from a judgment of the superior court for Yakima county, Rigg, J., entered June 13, 1905, in favor of the defendant, dismissing an action to quiet title, upon sustaining a demurrer to the complaint. Affirmed.

[1]Reported in 84 Pac. 404.

Reavis, Thorp & Wheeler, for appellant.

Rudkin & Luhman, for respondent.

MOUNT, C. J.—Plaintiff brought this action, praying that he be decreed the owner of a certain described quarter section of land, in Yakima county. The lower court sustained a general demurrer to the complaint. Plaintiff elected to stand upon the allegations of the complaint, and the cause was dismissed. Plaintiff appeals.

The facts stated in the complaint are, in substance, as follows: On October 18, 1882, appellant made a timber culture entry on the land in question at the United States land office at North Yakima, Washington. At the time he made this entry he was a special timber agent, having been appointed by the commissioner of the general land office on July 26, 1880. His term of office as such special agent expired in the year 1885. After filing upon the land, he commenced improving and cultivating and growing trees thereon, and complied diligently with the timber culture law. He spent considerable sums of money in planting and replanting trees, and in constructing ditches to irrigate the land, until the year 1889.

On the 28th day of October, 1889, one John A. Walker filed a contest in the local United States land office at North Yakima against the entry of appellant, upon the ground that appellant had not complied with the timber culture entry law, and subsequently, on December 9, 1889, said Walker filed a supplemental affidavit, alleging that appellant was incompetent to make the original timber culture entry because he was at the time of the entry a special agent or timber inspector appointed by the commissioner of the general land office. Upon the hearing of this contest, the local land office found, that the appellant had in good faith endeavored to comply with the law, and that no bad faith could be imputed to him; that he had expended considerable time and money attempting to grow timber; that the contestant, John A.

Walker, had known several years before the contest was instituted that the appellant, at the time of the entry, was a special agent in the land department, and that said Walker stood by and saw the cultivation and improvement going on and knew of the expenditures being made by the appellant on the land in controversy until 1889, when the land had trebled in value by reason of the improvements made thereon; but held that the entry originally made was prohibited by § 452 of the United States revised statutes, and for that reason cancelled the entry.

From this decision of the local land office, appellant appealed to the commissioner of the general United States land office, where the judgment was affirmed on the ground that the appellant was a special agent at the time of the initiation of his entry. An appeal was thereupon taken to the Secretary of the Interior, and that officer, by his first assistant, reversed the decision of the commissioner of the general land office and directed a dismissal of the contest, and held that appellant was entitled to the land. Upon petition for review, which was heard by the succeeding Secretary of the Interior, the decision of the former Secretary was reversed, and the decision of the commissioner of the general land office was affirmed, with directions to the local land officers to cancel the entry of appellant.

Thereafter said John A. Walker filed upon the land. Subsequently his filing was successfully contested by George L. Finn, respondent in this action. Mr. Finn thereupon filed upon the land in controversy, and in due time made final proof and received a patent from the government of the United States. The complaint alleges that the respondent had notice and knowledge of all of appellant's improvements and expenditures, equities, and rightful claims to the land, prior to the time respondent filed on the land in question.

U. S. Rev. Stats., § 452, provides:

"The officers, clerks, and employees in the general land office are prohibited from directly or indirectly purchasing

or becoming interested in the purchase of any of the public land, and any person who violates this section shall forthwith be removed from his office."

Under the provisions of this section, it is perfectly clear that appellant, being a special agent and in the employ of the general land office, was prohibited from making an entry upon the land at the time the original entry was made. His entry was therefore invalid. In addition to the plain terms of the statute, the land department of the government has held, since the year 1876, which was long prior to the entry of the appellant, that registers and receivers, their clerks and employees, and all persons intimately connected with such officers were included within the terms of the statute and were prohibited from making entries on public lands. *Nebraska v. Dorrington,* 2 Copp's Public Land Laws, 647. In 1890, the commissioner of the general land office held that the section above quoted applied to an employee in the office of the surveyor general of the district in which the land was situated. *Herbert McMicken,* 10 Land Dec. 97, 11 Land Dec. 96; Circular Letter, Sept. 15, 1890, 11 Land Dec. 348. This construction of the statute appears to have been followed by the land department ever since that time. *Miller v. Coleman,* 18 Land Dec. 394; *Robert J. Watson,* 33 Land Dec. 435, decided Feb. 25, 1905. All these decisions are clearly right.

The only case cited which shows a construction of the statute by the land department different from these cases is *Grandy v. Bedell,* 2 Land Dec. 314, which appears never to have been followed, because it was clearly against the plain provisions of the statute upon the point under consideration. It is true, this last named case was decided prior to the entry of the appellant upon the land in question. It is also true that appellant had, prior to his entry, received a letter from the commissioner of the general land office, to the effect that the provisions of U. S. Rev. Stats., § 452, did not apply to special agents; but this letter had reference to a case where appellant had made another filing upon another piece of land prior to

his appointment as special agent, and sought to and did afterwards make final proof thereon. It was not written in contemplation of an original entry of a new tract of land. Under the plain terms of the statute, the advice was erroneous and no rights were acquired in violation of the law. If the appellant's rights under the law have been erroneously denied by the land department, he may obtain redress in the courts. But where no error has been made in the cancellation of his entry, and no legal rights have been denied him by the land department, the ruling of that department is conclusive, and he cannot be heard to complain against one who was in no wise connected with the matters in controversy. *Shepley v. Cowan,* 91 U. S. 330, 23 L. Ed. 424.

This respondent apparently had no connection with the case of Walker v. Prosser, and was not interested therein until long after the entry of appellant had been cancelled. After Mr. Walker succeeded in his contest, and had filed on the land, and by some default not shown had forfeited his entry, then this respondent, with notice of all the proceedings, was permitted to file upon the land and acquire patent thereto. No reason is shown in the complaint why the respondent should be held to be a trustee of the title for the benefit of appellant, except the mere fact that, at the time respondent filed on the land, he knew that the appellant claimed some interest therein by reason of improvements made many years before. But respondent also knew, necessarily, that appellant had no legal claim to the land, because such claim had long since been terminated adversely to him by a tribunal competent for that purpose.

We think the complaint for these reasons fails to state a cause of action against the respondent. The judgment is therefore affirmed.

HADLEY, FULLERTON, ROOT, and CROW, JJ., concur.

[No. 5843. Decided February 15, 1906.]

C. C. MAY, *Appellant*, v. EDMUND SUTHERLIN, *Respondent*.[1]

LIMITATIONS OF ACTIONS—BY MINOR TO RECOVER REAL PROPERTY—STATUTE—WHEN BEGINS TO RUN. Under Bal. Code, § 4809, the time during which the owner of land is a minor is not a part of the time limited by Bal. Code, §§ 4796, 4797, requiring actions for the possession of land to be commenced within ten years; and an action commenced within four years after the minor attains his majority is within time.

ADVERSE POSSESSION—PAYMENT OF TAXES. Where title to land is claimed by adverse possession and the payment of taxes for seven years, under Bal. Code, § 5503, the claim of title must be made in good faith.

ADVERSE POSSESSION—CLAIM AND COLOR OF TITLE—GOOD FAITH—PURCHASE PENDENTE LITE. One who purchases land pending an action to recover possession and quiet the title and, after the judgment of a court of competent jurisdiction against his predecessor, holds possession in defiance of the judgment, is without color of title or good faith, although he was not served with process and no notice of *lis pendens* was filed.

LIS PENDENS—ACTION TO RECOVER POSSESSION OF REAL ESTATE. Notice of the pendency of an action to recover the possession of real estate is not necessary under Bal. Code, §§ 5515, 5518, providing that such actions shall not be affected by alienation *pendente lite*, and that judgment as to the right of possession shall be conclusive on the parties, and those claiming under them after the commencement of the action, which sections are not superseded or controlled by the general statute, Bal. Code, § 4887, providing for the filing of notice of *lis pendens* in certain forms of actions.

Appeal from a judgment of the superior court for Lincoln county, Poindexter, J., entered April 19, 1905, upon findings in favor of the defendant, on a cross-complaint, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

H. A. P. Myers, for appellant.

Alfred M. Craven and *Joseph Sessions*, for respondent.

[1]Reported in 84 Pac. 585.

RUDKIN, J.—Some time prior to the 21st day of August, 1889, John Y. Sutherlin entered the land in controversy in this action, under the homestead laws of the United States. On the above date Sutherlin died intestate in Lincoln county, and thereafter one Alice Rice, claiming to be the widow of said Sutherlin, made final proof and obtained patent for said lands, pursuant to said homestead laws. On the 8th day of July, 1891, the defendant Edmund Sutherlin, then a minor, through his guardian *ad litem,* brought an action in the superior court of Lincoln county, against the said Alice Rice, to recover possession of said homestead claim, and to quiet his title thereto. Thereafter such proceedings were had in said action that, on the 12th day of March, 1894, a judgment was duly entered, adjudging the defendant herein to be the owner in fee of said lands, and that the said Alice Rice and all persons claiming under her as purchasers, incumbrancers, or otherwise, were forever barred of all right, claim, or equity in or to said lands, and every part thereof. This judgment was never appealed from, and remains of full force and effect.

On the 30th day of November, 1891, while said last mentioned action was pending and before final judgment therein, the plaintiff in this action purchased the premises in controversy from the said Alice Rice, and immediately entered into possession thereof, and has continued such possession ever since. The plaintiff in this action was not made a party to said last mentioned action, and no notice of the pendency of said action was filed in the office of the county auditor of said Lincoln county. On the 26th day of March, 1894, the defendant herein commenced a further action against the plaintiff herein in the same court, to recover the possession of the lands in controversy. This last mentioned action was dismissed for want of prosecution on the 29th day of September, 1903.

The plaintiff brought the present action against the defendant to quiet his title to said lands, alleging in his complaint

that he was the owner in fee and had been in the actual possession thereof for more than ten years. The answer puts the plaintiff's title in issue, admits his possession for more than ten years, avers that the defendant did not arrive at the age of majority until the 28th day of February, 1901, and pleads the above mentioned judgment in bar of the action. The defendant also filed a cross-complaint, asking for the recovery of the possession of the premises in controversy and for damages for their detention. The case was tried before the court without a jury, and resulted in findings and a judgment in favor of the defendant, according to the prayer of his cross-complaint. From this judgment the plaintiff has appealed.

The only question presented on the appeal is that of the appellant's title to the lands in controversy, and the only title claimed by him is under the seven and ten year statutes of limitation. Bal. Code, §§ 4796, 4797, provides that actions for the recovery of real property or for the recovery of the possession thereof must be brought within ten years after the cause of action shall have accrued, and no action shall be maintained for such recovery unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action. Section 4809 provides that if a person entitled to bring an action be at the time the cause of action accrues, either under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of the action. It is conceded that the respondent was a minor at the time the right of action to recover the premises in controversy accrued, and that he did not attain his majority until February, 1901. It is manifest, therefore, that the ten-year statute of limitations cannot avail the appellant.

Bal. Code, § 5503, provides that,

"Every person in actual, open and notorious possession of lands or tenements, under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title."

Bal. Code, § 5505, provides that a minor shall commence an action to recover lands and tenements held or claimed under the above section within three years after attaining his majority. The application of the last statute mentioned depends upon whether the appellant was in possession under claim and color of title made in good faith, and this in turn depends upon whether he was bound by the judgment in the prior action brought against his predecessor in interest, he being a *pendente lite* purchaser. For, if bound by that judgment, it completely destroyed all claim or color of title as effectually as would a deed from the appellant to the respondent of the same date. As said by the court in *Sholl v. German Coal Co.*, 139 Ill. 21, 28 N. E. 748:

"The important inquiry then is, whether Gideon H. Rupert, at the time he paid taxes and held possession as stated, had color of title, as the three must unite to authorize a recovery. The deed from Ansel Haines and Jonathan Haines of April 12, 1853, to Rupert and Gill, and the deed of November 17, 1855, from Gill to Rupert, were sufficient to place color of title in Gideon H. Rupert, and had nothing transpired to divest such title, we would feel inclined to hold that under such color, and the payment of taxes and possession, as we have heretofore mentioned, a recovery might be had. But in September, 1869, by the decree of the circuit court in the partition suit heretofore mentioned, Gideon H. Rupert was divested of all title to the land involved in the northwest quarter of section 12, and his payment of taxes and possession after that date was under no title whatever, as the decree had deprived him of title. Suppose that Rupert had conveyed the premises to a third party by quitclaim deed,

and after making such deed had continued in possession and paid taxes for seven successive years; under such circumstances would he be entitled to claim the benefit of the statute of limitations? In *Heacock v. Lubuke,* 107 Ill. 396, we held that after a conveyance a party could not claim the benefit of the statute. The same principle has been laid down in *Harris v. Herdeman,* 27 Texas 248, and in *Gower v. Quinlan,* 40 Mich. 572. By the decree the title of Rupert was in effect extinguished, and after that time he occupied as one holding the possession of land under no paper title."

But it should require no argument to show that a party who holds property contrary to, and in defiance of, the judgment of a court of competent jurisdiction, is without color or claim of title, and that good faith is entirely wanting.

Counsel suggests, however, that this judgment was not binding on the appellant, because he was a *pendente lite* purchaser, was not made a party to the action, and no notice of *lis pendens* was filed. Bal. Code, § 5515, provides that,

"An action for the recovery of the possession of real property against a person in possession cannot be prejudiced by any alienation made by such person either before or after the commencement of the action; . . ."

Section 5518 provides that,

"In an action to recover the possession of real property, the judgment therein shall be conclusive as to the estate in such property and the right to the possession thereof, so far as the same is thereby determined, upon the party against whom the same is given, and against all persons claiming from, through, or under such party after the commencement of such action, except as in this section provided. When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant, or his successor in interest as to the whole or any part of the property, shall, upon application to the court, or judge thereof, be entitled to an order vacating the judgment, and granting him a new trial, upon the payment of the costs of the action."

It is true that section 61 of the Code of 1881, which was in force at the time the former action was commenced and the

conveyance to appellant made, and Bal. Code, § 4887, which was in force at the time of the rendition of the final judgment, provide for the filing of a notice of *lis pendens* in actions affecting real property; but the former sections are special, relate to a particular class of actions, and are not superseded or controlled by the general statute relating to notice of *lis pendens*. It was so held in *Sheridan v. Andrews*, 49 N. Y. 478, and *Webster v. Pierce*, 108 Wis. 407, 83 N. W. 938, under similar statutory provisions, and this is in accord with the general rule of statutory construction.

We are therefore of opinion that the appellant has no title to the property in controversy, under the statute of limitations or otherwise, and the judgment of the court below is accordingly affirmed.

MOUNT, C. J., HADLEY, FULLERTON, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 6023. Decided February 16, 1906.]

ALEXANDER SCHULZE *et al., Respondents,* v. OREGON RAILROAD & NAVIGATION COMPANY *et al., Appellants.*[1]

APPEAL—PARTIES—RIGHT TO APPEAL. An order correcting a judgment by eliminating the names of certain parties inadvertently included, who were dismissed from the action before judgment, thereby making the judgment speak the truth, is not appealable by the other judgment debtors, as it does not affect their rights, the time for appealing from the original judgment having expired.

SAME—PARTIES AGGRIEVED. Where part of the defendants are dismissed from an action before judgment, and a judgment inadvertently entered against them is subsequently corrected by an order *nunc pro tunc* eliminating their names, they are not parties aggrieved by the modification, and cannot appeal therefrom.

Appeal from an order of the superior court for Spokane county, Poindexter, J., entered September 20, 1905, correct-

[1]Reported in 84 Pac. 587.

ing an error in a judgment upon motion of the judgment creditors. Appeal dismissed.

W. W. Cotton, Samuel R. Stern, James G. Wilson, William T. Muir, and *Veazie & Freeman,* for appellants, contended, *inter alia,* that, the nonconformity of the judgment with the verdict in this case was a mistake, neglect and omission of the clerk, and was also an irregularity in obtaining the judgment, and the judgment should, therefore, have been vacated and modified on the motion of the defendants. Bal. Code, § 5153; Laws 1903, p. 285; *Seattle etc. R. Co. v. Johnson,* 7 Wash. 97, 34 Pac. 567; *State ex rel. Hennessy v. Huston,* 32 Wash. 154, 72 Pac. 1015; *Hennessy v. Tacoma Smelting etc. Co.,* 33 Wash. 423, 74 Pac. 584. An appeal from an irregularly entered judgment will not lie until a motion to vacate or modify has been presented to the lower court and acted upon. *State ex rel. Hennessy v. Huston, supra; Belles v. Carroll,* 6 Wash. 131, 32 Pac. 1060; *Pacific Supply Co. v. Brand,* 7 Wash. 357, 35 Pac. 72; *Hennessy v. Tacoma Smelting Co., supra; Walton v. Hartman,* 38 Wash. 34, 80 Pac. 196. An appeal will not lie by one party upon a final judgment until a judgment is a finality as to all the parties to it. Bal. Code, § 6504; *Johnson v. Lighthouse,* 8 Wash. 32, 35 Pac. 403; *Fairfield v. Binnian,* 13 Wash. 1, 42 Pac. 632; *Dwyer v. Schlumpf,* 6 Wash. 25, 32 Pac. 1005; *Missouri Pac. R. Co. v. Scott,* 78 Texas 360, 14 S. W. 791; *Whitaker v. Gee,* 61 Tex. 217; *Case v. Ingle,* 2 Ind. Ter. 309; *Maley v. Lake View etc. R. Co.,* 84 Ill. App. 55; *Kellar v. Jordan,* 147 Ind. 113, 46 N. E. 343; *Billson v. Lardner,* 67 Minn. 35, 69 N. W. 477. By moving to amend the judgment and entering a modification thereof, the respondents estopped themselves from denying that the time of appeal began to run from the date of the modification. *Herzog v. Palatine Ins. Co.,* 36 Wash. 611, 79 Pac. 287. In this case there is the right of contribution between the appellants, The Oregon Railroad & Navigation Company and Burns Brothers,

a copartnership, and their substantial interest entitled them to move the court to take the proceeding to correct the judgment. 7 Am. & Eng. Ency. Law (2d ed.), 364, 365; 1 Jaggard, Torts, 215, 216. Where a judgment is modified the time for appeal begins to run from the date of the modification and not from the date of the original judgment. *State ex rel. Hennessy v. Huston,* and *Hennessy v. Tacoma Smelting Co., supra; Bixby v. Bent,* 59 Cal. 522; *Hayes v. Silver Creek etc. Water Co.,* 136 Cal. 238, 68 Pac. 704; *Johnson v. Foreman,* 24 Ind. App. 93; *Sass v. Hirshfeld,* 23 Tex. Civ. App. 1, 56 S. W. 602. The purported entry of the amendment of the judgment *nunc pro tunc* would not have the effect to limit the time to appeal from the judgment to ninety days from the 27th day of December, 1904, but the time for the appeal would begin to run from the actual date of the *nunc pro tunc* order, September 20, 1905. Black, Judgments (2d ed.), § 163; *Borer v. Chapman,* 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532; *Martin v. Smith,* 11 S. D. 437, 78 N. W. 1001; *Providence Rubber Co. v. Goodyear,* 6 Wall. 153, 18 L. Ed. 762; *Andrews v. Branch Bank,* 10 Ala. 375; *In re Fifteenth Ave. Extension,* 54 Cal. 179; *Noce v. Daveggio* (Cal.), 4 Pac. 495; *Coon v. Grand Lodge United Order,* 76 Cal. 354, 18 Pac. 384; *Globe Smelting etc. Co. v. Spann,* 6 Colo. App. 146, 40 Pac. 198; *Charles v. Fawley,* 71 Ohio St. 50, 72 N. E. 294.

Munter & Jesseph, for respondents.

Root, J.—This cause came on for trial before the judge and jury in the trial court, and resulted in a verdict for plaintiffs, against all the defendants excepting John Burns and James Burns, who were dismissed from the action before the verdict was returned. Judgment thereafter, to wit, on the 27th day of December, 1904, was entered against all of the defendants. Thereafter an appeal was taken from said judgment to this court, which appeal was dismissed, on the 28th day of April, 1905. On the 11th day of September, 1905,

the appellants Oregon Railroad & Navigation Company, John Burns, James Burns, and Burns Brothers, a copartnership, filed a motion in the superior court to vacate and modify the judgment which had been entered on the 27th of December, 1904, basing their motion on several grounds. On the 13th of September, 1905, the respondents filed a motion in the superior court to amend, *nunc pro tunc,* the judgment entered December 27, 1904, in such a manner as to eliminate the names of James Burns and John Burns as judgment debtors, and to show that the action had been dismissed as to said James Burns and John Burns. The court denied the motion of appellants, and granted that of respondents. Thereafter appellants appealed from what they term the "judgment rendered and entered on September 20, 1905, modifying said judgment and order of December 27, 1904, and from said judgment and order of December 27, 1904, as modified." The Oregon Railroad & Navigation Company appeals in its behalf. John Burns and James Burns join in a separate appeal, and Burns Brothers, a copartnership, prosecutes still another appeal.

The respondents move to dismiss all of these appeals. They contend that the order of the court made September 20, 1905, made no change whatever in the judgment of December 27, 1904, in so far as it affected the rights or interests of the appellant the Oregon Railroad & Navigation Company, or the appellant Burns Brothers, a copartnership. They contend that said order of September, 1905, could not be appealed from by James Burns and John Burns, for the reason that it was an order in their favor and had the result of making the judgment of December, 1904, one of dismissal as to them. They urge that the appeals could in no wise be effective for the purpose of reviewing the judgment of December, 1904, inasmuch as the time for taking an appeal from said judgment had expired long before these appeals were taken, and that the appeals from the order made in September could not

authorize or justify a review in any manner of the judgment of December, 1904.

We think the contention of respondents must be sustained. The presence of the names of James and John Burns as judgment debtors in the judgment entered in December, 1904, was clearly the result of inadvertence. The only effect of the order of September, 1905, was to correct this mistake. The action which the court took in thus making the record speak the truth could in no wise injure the other appellants, or in any manner impair or affect their rights. The judgment as to them remained as entered in December, 1904. The time for appealing from that judgment had expired long before these appeals were taken. So far as James and John Burns are concerned, the order of September, 1905, had for its purpose the correction of the judgment entry of December, 1904, so that it would speak the truth and show that the action was dismissed as to them. Hence, they were not aggrieved by this order, and no relief could be accorded them upon appeal to this court.

The respondents' motions to dismiss the appeals herein are granted.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 5934. Decided February 16, 1906.]

F. H. WESTCOTT *et al., Respondents,* v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant.*[1]

CARRIERS—INJURY TO PASSENGERS—CARRYING DOGS IN STREET CARS. A street car company is liable to a passenger for injuries inflicted by a dog belonging to a fellow passenger which the company permitted to be carried in a passenger coach.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 17, 1905, upon the verdict

[1]Reported in 84 Pac. 588.

of a jury rendered in favor of the plaintiff, a passenger on a street car, for damages inflicted by a dog permitted to remain in the car, contrary to the rules of the company. Affirmed.

Peters & Powell, for appellant, cited: *New York etc. R. Co. v. Bennett,* 50 Fed. 496.

Robert A. Devers, for respondents. It was the defendant's duty to object to the presence of the dog on the car in violation of its rules. *Bass v. Chicago etc. R. Co.,* 36 Wis. 450, 17 Am. Rep. 495. The instruction allowing recovery for shame or humiliation which was a necessary part of the injury was proper. *Willson v. Northern Pac. R. Co.,* 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Houston etc. R. Co. v. Perkins,* 21 Tex. Civ. App. 508; *Texas etc. R. Co. v. Hughes* (Tex. Civ. App.), 41 S. W. 821; *Texas etc. R. Co. v. Jones* (Tex. Civ. App.), 39 S. W. 124; *Louisville etc. R. Co. v. Whitman,* 79 Ala. 328. It was the duty of the conductor to render assistance and prevent further injury. *Craker v. Chicago etc. R. Co.,* 36 Wis. 657, 17 Am. Rep. 504; *Day v. Owen,* 5 Mich. 520, 72 Am. Dec. 62; *New York etc. R. Co. v. Bennett,* 50 Fed. 496.

Per Curiam.—This action was brought by the respondents, to recover for damages to the clothing and to the sensibilities of respondent Margaret Westcott while a passenger upon one of appellant's cars. These damages were inflicted by a four-months-old puppy, brought into the car by another lady passenger, and permitted by the conductor to remain there. Verdict was rendered in favor of the respondents, judgment was entered thereon, and from such judgment this appeal is taken.

A street car company has no right to carry dogs upon a coach that is set apart for passengers, and if it does so, and damage is caused by said dog, it must respond to the same. There being no errors in instructions, or in the admission of testimony, the judgment is affirmed.

[No. 6008. Decided February 16, 1906.]

The Hotel Company, *Appellant*, v. Merchants Ice & Fuel Company, *Respondent*.[1]

Appeal—Record—Statement of Facts. In the absence of a statement of facts errors based upon the evidence cannot be reviewed.

Same—Extension of Time for Filing. Error in refusing an extension of time for filing a statement of facts will not be reviewed where the entire 90 days within which the statement could be served and filed has expired without the filing of any statement.

Damages—Technical Breach—Nominal Damages. In an action for the breach of a contract to deliver wood, a finding of a technical breach in that the entire quantity was not delivered supports a judgment for nominal damages only, where there was no finding as to the value of the wood or the damage sustained.

Appeal by the plaintiff from a judgment of the superior court for Spokane county, Belt, J., entered February 5, 1904, upon findings in favor of the plaintiff for nominal damages, after a trial on the merits before the court without a jury, in an action for breach of contract. Affirmed.

Samuel R. Stern, for appellant.

Post, Avery & Higgins, for respondent.

Crow, J.—On April 11, 1902, appellant, The Hotel Company, and respondent, Merchants Ice & Fuel Company, both corporations, of Spokane, Washington, entered into a written contract, whereby respondent agreed to sell and deliver to appellant, during the fifteen months immediately succeeding, fifteen hundred cords of wood, at the price $3.50 per cord, payable upon the 1st day of each month thereafter as the wood was delivered. Appellant instituted this action to recover damages for a breach of said contract, claiming that all of said wood had not been delivered within said time, although demand had been made therefor; that only seven hundred and

[1]Reported in 84 Pac. 402.

ninety-seven and one-half cords had been delivered; and that damages had resulted to appellant in the sum of $705.

On trial of the issues joined, findings of fact were made from which it appears, that during the first eight months appellant requested the delivery of wood thereunder, but that respondent either would not or could not deliver sufficient wood per month to run said hotel, but that thereafter until July 11, 1903, respondent furnished each month within said time all wood requested or required by appellant; that the total amount of wood so furnished was nine hundred ninety-seven and one-half cords; that during the months in which no wood was furnished under said contract, appellant did not purchase wood elsewhere for the purpose of making good said default; that the evidence did not disclose at what particular time default was made, nor what deficiency of wood occurred during any of said months; that from November 12, 1902, until July 11, 1903, respondent did not refuse to furnish during each month sufficient wood to run said hotel, nor did appellant during any of said months demand wood that was not furnished or delivered by respondent. The findings fail to show the value of any wood purchased by appellant from other parties during the period covered by said contract. Upon these findings the court made conclusions of law to the effect, (1) that there had been a technical breach of said contract on the part of respondent, but that appellant had not suffered any substantial damage by reason thereof; (2) that appellant should recover nominal damages in the sum of $5; (3) that respondent was not obliged by said contract to deliver any wood after July 11, 1903. Upon these findings and conclusions, judgment was entered in favor of appellant in the sum of $5 and costs, and this appeal has been taken.

Appellant's brief contains many arguments and statements which we cannot consider, as they are based upon purported evidence claimed to have been admitted, which is not properly before us, there being no statement of facts in the record. From orders contained in the transcript, it appears that, after

the expiration of the thirty days allowed for proposing a statement of facts, and within sixty days after the time for appeal had been running, appellant made two applications for extensions of the time within which to serve and file its proposed statement of facts. These applications, being resisted by respondent, were denied, and it does not appear that any proposed statement of facts was ever filed, served, or certified. The appellant has incorporated in its brief what purports to be quotations from evidence of witnesses present at the trial, and bases many of its arguments upon such supposed evidence, all of which we must of necessity ignore.

Appellant contends that the court erred (1) in refusing to grant judgment as prayed in the complaint; (2) in allowing nominal damages only; (3) in refusing to grant an extension of time for filing and serving a proposed statement of facts, on appellant's first application; (4) in refusing to grant an extension of time on appellant's second application. Respondent has moved this court to strike appellant's opening brief, dismiss the appeal, and affirm the judgment, on numerous grounds. By reason of the view entertained by us on the merits, it will not be necessary to discuss this motion.

By its third and fourth assignments of error appellant complains of the action of the trial court in twice refusing it an extension of time within which to serve and file a proposed statement of facts. It would be an idle proceeding for us to review these orders on this appeal, because no order which would now be made would be of any benefit to appellant, the entire ninety days within which a statement could be served and filed, even though an extension had been given, having long since expired. *Crowley v. McDonough,* 30 Wash. 57, 70 Pac. 261.

There being no statement of facts, the only question to be considered is whether the judgment is warranted by the findings. We think it is. It is true, the court found a technical breach of the contract on the part of respondent, in that respondent did not furnish the entire fifteen hundred cords of

wood; but the findings utterly fail to show what damage, if any, had been sustained by appellant by reason of such technical breach of contract. In its brief the appellant bases its contention for damages on what it claims was proven by the evidence; but as there is no evidence before us, we cannot consider such argument. On the findings made, the only judgment which the court could enter in favor of appellant was one for nominal damages, which was done.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, ROOT, and HADLEY, JJ., concur.

FULLERTON and RUDKIN, JJ., concur in the result.

[No. 5914. Decided February 19, 1906.]

THE STATE OF WASHINGTON, *Respondent,* v. WONG TUNG HEE, *Appellant.*[1]

CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL — CORRECTION. Statements of counsel for the state, on argument to the jury, which were outside of the record, will not constitute prejudicial error entitling the accused to a new trial, where the only statement objected to was in relation to the failure of the defense to produce witnesses at the preliminary examination, and the court upon request, fully and explicitly instructed the jury to disregard this and all statements outside of the record, and no exceptions were taken to the ruling of the court.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered July 6, 1905, upon a trial and conviction of the crime of manslaughter. Affirmed.

Oscar Cain and *M. O. Reed,* for appellant.

Lester S. Wilson, for respondent.

RUDKIN, J.—The defendant was convicted of the crime of manslaughter, under an information charging the crime of

[1]Reported in 84 Pac. 596.

murder in the first degree, and from the judgment and sentence of the court, this appeal is prosecuted. The errors assigned are all based on alleged misconduct of the prosecuting attorney in his closing argument to the jury, and the rulings of the court in relation thereto. In the course of his argument the attorney for the state made some allusion to the course pursued by the appellant on his preliminary examination. Counsel for appellant said, "I submit that the preliminary examination is not in this case." The court, "Mr. Wilson may be getting outside of the record, but every attorney in the country does it and ought to be willing to accord the same privilege to another. Mr. Wilson, do not transcend the record any more than you are warranted in. If I kept you all down to the exact material questions you could not speak over three minutes." To this statement or ruling of the court no exception was taken. Later in the argument the court of its own motion said, "Mr. Wilson, I think you are going too far. You are asserting matters and things not shown by the record. You can draw deductions if you have a mind to, but you ought not to state as a fact anything not shown by this record here."

At the close of the argument counsel for appellant said, "We desire to take exception to the statements of the prosecuting attorney regarding matters outside of the record and his misconduct in making this statement. The court: Will you designate those statements? Mr. Cain: In regard to our not producing witnesses at the preliminary hearing which under the law we are not entitled to. The court: I will strike it out. There are always statements made by counsel on each side that are not strictly evidence. Counsel frequently make statements not in evidence—that are hardly fair deductions from the evidence that is before the court. I called Mr. Wilson's attention to it, and I now strike it out. I will strike out any statement made as to any facts occurring outside of the evidence in this case. I will say to the jury now, before entering upon my general instructions—I will instruct the jury to disregard any statement made by counsel on either side of this case, that is not borne out by the testi-

mony in this case. Look to the testimony and the testimony alone in reaching your conclusion and in reaching the verdict you will render."

To which statement and ruling of the court no exception was taken.

While our attention has been directed to numerous statements made by the prosecuting attorney in the course of his argument, it will be seen from the foregoing reference to the record that the only statement objected to or called to the attention of the trial court was the statement in relation to the failure of the defense to produce witnesses at the preliminary examination. The court fully and explicitly instructed the jury to disregard this, and all other statements of counsel not borne out by the testimony, and no exception was taken to any of the court's rulings. This court has repeatedly held that, "The remedy to correct misconduct of counsel is to move the trial court to act in the matter, and except to its refusal so to do, if it does so refuse; it is not enough merely to except to the supposed misconduct." *State v. Van Waters,* 36 Wash. 358, 78 Pac. 897. See, also, *State v. Regan,* 8 Wash. 506, 36 Pac. 472; *State v. Hawkins,* 27 Wash. 375, 67 Pac. 814; *State v. Bailey,* 31 Wash. 89, 71 Pac. 715.

In this case there were no exceptions to any rulings of the court, or to any refusal to rule. The court corrected, so far as lay within its power, the only misstatement to which its attention was directed. Cases may arise in which statements of counsel outside the record will be so prejudicial to the rights of a party that no action of the trial court can counteract their effect, but no such case is presented here.

The judgment is therefore affirmed.

FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5882. Decided February 19, 1906.]

A. T. DISHMAN, *Appellant*, v. JOHN T. HUETTER, *Respondent*.[1]

CONTRACT—BREACH—RESCISSION—FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT. Where the main consideration for the leasing of a quarry was an agreement by the lessors not to engage in the business of quarrying or selling rock within a specified territory, findings by the court to the effect that there was a violation of this agreement would be sufficient to support a judgment releasing the lessee from further obligation to perform the contract upon his part; and the fact that one of the findings erroneously states the foregoing agreement to be the sole consideration for the lease is immaterial.

SAME—RESCISSION—PLEADING AND PROOF—RECOVERY FOR MISTAKE NOT ALLEGED. In such a case, upon breach of the contract by the lessors and a rescission of the same by the lessee, the lessors could not recover, in an action brought upon the contract, the value of rock removed by the lessee by mistake after the rescission, in the absence of an amendment, nor would such facts support a judgment for the value of the rock removed by mistake, in the absence of any evidence or findings as to such value.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 11, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

L. J. Birdseye and *Harris Baldwin*, for appellant.

Post, Avery & Higgins, for respondent.

RUDKIN, J.—The plaintiff and one Evans are the owners of a stone quarry, in Spokane county, and the defendant owns a quarry on adjoining lands. On the 23rd day of September, 1900, the plaintiff and said Evans, of the first part, and the defendant of the second part, entered into a written agreement, whereby the plaintiff and Evans leased their said quarry to the defendant for a term of three years, together

[1]Reported in 84 Pac. 590.

with the right of access thereto and the right to quarry and remove stone therefrom. The defendant agreed to pay ten cents per ton or perch for all stone removed from both quarries during said term. The agreement contained this further provision:

"It is further expressly agreed and understood between the parties to these presents that said first parties are not to take any rocks from, operate or work in said above mentioned quarry, nor are they to give a lease thereon to any person for that purpose, and they further agree that during the time and term of this agreement they are not to sell any rubble rock to any person or persons in the city of Sopkane or at any place within a radius of one hundred (100) miles from Spokane, and are not to engage either directly or indirectly or be interested with any person in any manner in the selling or quarrying of rubble rock within the aforesaid territory."

This action was brought to recover the purchase price or royalty for the rock quarried and removed under said contract. The complaint alleged the ownership of the quarries by the respective parties, the execution of the above agreement, the removal of 20,000 ton or perch of rock under the agreement, the failure to pay for the same at the contract price, the assignment by Evans of his interest in the contract to the plaintiff, and prayed for judgment in the sum of $2,000. The answer, after certain denials, alleged affirmatively, that on or about the first day of October, 1901, and continually thereafter the plaintiff and said Evans violated the terms of said contract by quarrying and selling rubble rock within the city of Spokane and surrounding territory contrary to the provision of said contract; that on said date the defendant notified the plaintiff and said Evans of such violation, and thereupon rescinded said contract; that the defendant has paid in full for all rock quarried or removed prior to such rescission; and that since such rescission the defendant has exercised no act of possession, right or control over the quarry owned by the plaintiff and said Evans and has quarried or removed no rock therefrom. The reply denied the affirmative

portion of the answer. The action was tried by the court without a jury. The court found the execution of the contract as alleged, the assignment from Evans to the plaintiff, and further,

"(3) That in the summer of 1901, and continuously thereafter until September 22, 1903, the plaintiff violated said contract in that he was throughout said time interested in the selling and quarrying of rubble rock within the territory mentioned in said contract, to wit: the city of Spokane and within a radius of one hundred miles from said city, and during all of said time he was engaged in selling rubble rock to various parties in said city of Spokane. (4) That defendant learned of the plaintiff's violation of said contract on or about October 1, 1901, and thereupon notified him of such violation and that the contract was at an end, and he would pay no further royalty thereunder. (5) That prior to the time of the notification mentioned in the preceding paragraph, the defendant had paid the royalty according to said contract for all rubble rock theretofore mined or removed. (6) That the promise of the parties of the first part named in said contract, and of each of them, not to engage in the business of quarrying or selling rubble rock within the territory aforesaid during the period of three years named in said contract, was the sole consideration for the promise of the defendant in said contract to pay said royalty of ten (10) cents per ton or perch for the rubble rock quarried during said period. (7) That after the defendant learned of the said violation of said contract on the part of the plaintiff, he did not do any work under said contract, nor did he intentionally remove rock whatsoever from the quarry owned by the plaintiff and said Evans. That whatever rock was removed by him thereafter from said quarry was so mined and removed under the mistake as to the location of the line dividing defendant's quarry from the quarry owned by the plaintiff and said Evans."

Upon these findings a judgment of dismissal was entered, from which the plaintiff appeals. There is no statement of facts or bill of exceptions, so that the only question before us for review is the sufficiency of the findings to support the judgment. Counsel criticise the 6th finding of the court as

above set forth, wherein the court finds that the agreement not to engage in the business of quarrying or selling rubble rock within certain territory was the sole consideration for the promise on the part of the defendant to pay ten cents per perch or ton for all rock removed from the quarries. This finding is perhaps broader than a true construction of the contract would warrant, as the value of the rock that might be removed from the quarry owned by the appellant and Evans was some consideration for the promise on the part of the respondent, but however this may be, it is manifest that the agreement on the part of the appellant and Evans not to engage in the business of quarrying or selling rock within the territory named, was the principal object and a vital part of the contract in suit, and a violation of that portion of the contract by the appellant and Evans would release the respondent from further obligation to perform on his part. 7 Am. & Eng. Ency. Law (2d ed.), 153; *Munsey v. Butterfield,* 133 Mass. 492. And if the respondent paid in full for all rock removed up to the time of the rescission of the contract at the contract price, and thereafter refrained from entering upon the quarry of appellant and Evans and from quarrying or removing rock therefrom, it is equally manifest that the appellant cannot recover.

Counsel further criticise the 7th finding of fact, wherein the court finds that the respondent did not *intentionally* remove any rock from the quarry of appellant and Evans after the rescission of the contract, and that whatever rock was thereafter removed was *by mistake.* If the contract was rescinded as found by the court, the appellant could not, under the allegations of his complaint, recover the value of rock thereafter removed by mistake, as there is no allegation in the complaint as to such value. The action is founded upon the contract and as no recovery can be had on the contract by reason of its rescission there could be no recovery at all, in the absence of an amendment, or the reception of proof which would be equivalent thereto. In any event the finding as

made by the court would not support a judgment in any amount in favor of the appellant. The court did not find that any rock was in fact removed after the rescission, nor did it find the value thereof. It simply found that if any was in fact removed it was removed by mistake. The appellant brought the case to this court on the findings alone, and as these will support no other judgment than that which the court actually rendered, the judgment must be affirmed, and it is so ordered.

FULLERTON, HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6073. Decided February 19, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. B. OPPENHEIMER, *Appellant*.[1]

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—EVIDENCE—PROOF OF OTHER CRIMES. Upon a charge of obtaining money upon false pretenses by means of making a collection, upon a day named, falsely representing that the accused was an agent of the prosecuting witness and authorized to collect his accounts, evidence of similar collections from other parties under similar fraudulent pretenses, is inadmissible for the purpose of showing intent, or for any purpose, where there is nothing unusual or extraordinary in the means employed and no connection between the collections made.

SAME—DEFENSES—ADVICE OF ATTORNEY. Upon a prosecution for obtaining money under false pretenses, it is competent for the defendant to prove that he had collected money as agent for the prosecuting witness under the advice of an attorney, believing that he had the right to do so, but only when it appears that the advice was given after a full and fair statement of all the facts, made in good faith.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 15, 1905, upon a trial and conviction of the crime of obtaining money under false pretenses. Reversed.

[1]Reported in 84 Pac. 588.

W. H. Abel, for appellant.

E. E. Boner and *J. C. Cross,* for respondent.

RUDKIN, J.—The defendant was informed against in the court below for the crime of obtaining money under false pretenses. The substance of the charge was that, on the 11th day of July, 1905, the defendant obtained from the Grays Harbor Oyster Company the sum of $1.50, by falsely and fraudulently representing and pretending that he was the agent and in the employ of one Carney, and was duly authorized to collect said amount. The defendant was convicted, and prosecutes this appeal from the final judgment of the court.

It appears from the testimony that some time during the month of May, 1905, the prosecuting witness, Carney, who published the Aberdeen Herald and ran a printery in connection therewith, made arrangements with the proprietors of the Anheuser Music Hall for the printing of their programs. Carney was to print the programs at his own expense, but received as compensation for his services the fees for all advertisements printed in connection therewith. Carney entered into an agreement with the appellant, whereby the appellant was to solicit advertisements for the program and receive for his services one-half the fees for all advertisements which he might procure. Carney, as a witness for the state, testified that the advertising fees amounted to the sum of $60 in all, and that he paid the appellant his half thereof, $10 by check and $20 on an order given by the appellant. He was then asked the following question:

"I will ask you whether or not, about the 22d day of May, 1905, or just prior thereto, you had any conversation with Mr. Oppenheimer in relation to his assuming to collect your money."

To this question the appellant objected unless the answer was confined to the particular collection mentioned in the information. The objection was overruled and the witness detailed the conversation as follows:

"I had just started out to collect my bills on the program, from the office. Oppenheimer came to me and wanted me to go back to the office. I told him I was in a hurry, but he persisted, and I walked back there with him. When he got in there he informed me that he had gotten into serious trouble and had to have some money, and that he had collected some money on the program— Mr. Shields: Defendant objects, and asks that this statement that Mr. Carney has made already be stricken and the jury instructed not to regard it, for the reason—I don't know whether or not I care to state my reason in length—Carney and Oppenheimer have had trouble here for six or eight months. Now, your Honor, that is the reason for objecting to these conversations. If it relates to the particular crime, I will not have any objection. Court: That is what he is stating. Proceed. [Answer continued] He informed me that he had the day before collected some payments on that program. He gave me the names of the parties and the amount obtained from each, which figured $17.50. I said, 'Oppenheimer, you may have been in trouble yesterday, but you are in bigger trouble today unless you dig that money up.' He agreed to get that money by five o'clock that evening. That is the extent of that conversation."

The witness further testified that the appellant made other collections after said conversation, to the amount of $18, $16.50 of which was from parties other than the Grays Harbor Oyster Company. The admission of this testimony is assigned as error.

Testimony as to the admissions or confessions of June 2 might have had a bearing on the question of the appellant's authority to make collections on account of program advertisements at some stage of the trial, had the appellant asserted or relied upon an authority conferred or existing before such earlier collections were made; but the testimony was not admitted for that purpose, nor does the respondent attempt to sustain the ruling of the court on any such ground. The respondent takes the broad position that testimony as to any and all collections made by the appellant on account of the program advertisements, whensoever and from whomsoever made, was competent as bearing upon the question of

intent, and the court below so ruled. This ruling was error, under the decision of this court in *State v. Bokien,* 14 Wash. 403, 44 Pac. 889. The defendant in that case was accused of obtaining money under false pretenses by giving a check on a bank in which he had no funds. The court admitted testimony tending to show that the defendant had given checks to various other parties, seven in number, shortly before the giving of the check in controversy, all of which were not paid for want of funds. This court, in reversing the judgment, said:

"The evidence was not competent to prove the intent of the defendant in the particular transaction mentioned in the information, for the reason that it would not logically or legitimately follow that he intended to defraud Sharick because he had defrauded other parties at various times previously. It was not competent for the purpose of showing defendant's motive, for that, as well as his intent, would be inferred from his acts. The question of mistake was not involved in the case, and the previous transactions of the defendant, which were permitted to be shown, no more formed a part of a single scheme than the several larcenies of a thief (*State v. Kelley,* 65 Vt. 531, 36 Am. St. Rep. 884, 27 Atl. 203); and it certainly would not be competent in order to show that one had stolen certain property to prove that he had committed larceny at a previous time. The evidence as to these checks which were not mentioned in the information must have been greatly prejudicial to the defendant, for it in effect compelled him, without previous notice, to acquit himself of at least seven distinct offenses in addition to the one with which he was directly charged."

In *State v. Gottfreedson,* 24 Wash. 398, 64 Pac. 523, the court reaffirmed the *Bokien* case, and in both cases cited with approval *Commonwealth v. Jackson,* 132 Mass. 16, where it was held that, on the trial of an indictment for obtaining the property of another under false pretenses in the sale of a horse, evidence of similar false pretenses in sales to other parties shortly before the sale in question was inadmissible on the question of intent. The Massachusetts court alludes

to the harmful effect of such testimony, and expresses a doubt as to whether the exception to the general rule of law should be further extended.

In *Regina v. Holt,* 8 Cox C. C. 411, the prisoner was charged with obtaining a specific sum of money from one Hirst by false pretenses. It appeared that he was employed by his master to take orders, but not to receive moneys, and indeed was forbidden so to do, and he was proved to have obtained the sum from Hirst by representing that he was authorized by his master to receive it. Evidence was admitted of his having, within a week from the above obtaining, obtained another sum of money from another person by a similar false pretense, such obtaining not being in any way mentioned in the indictment. It was held by the court of criminal appeals that such evidence was not admissible for the purpose of proving the intent of the prisoner when he committed the act charged in the indictment, and that the conviction should be quashed.

These cases are not distinguishable from the case at bar. In the *Bokien* case the defendant obtained money or property from various persons by means of the same false representation, viz., that he had money in bank subject to check; in the *Jackson* case the defendant obtained money or property from various persons by means of similar false pretenses in the sale of horses; and in the *Holt* case the defendant obtained money from various persons by falsely representing that he had authority from his master to make the collections, just as in this case.

The respondent attempts to distinguish this case from the cases we have cited, under the rule announced by this court in *State v. Pittam,* 32 Wash. 137, 72 Pac. 1042. In that case the defendant was accused of the embezzlement of the sum of $150 belonging to his employer. The defendant admitted the receipt of the money, but disclaimed any intention to misappropriate it. The state was permitted to prove that the defendant, who was the agent and cashier of a corporation,

had given receipts to various patrons of the corporation, and made entries in the books for less than the amounts received, just as he had done in the instance of the $150 mentioned in the charge against him. This court affirmed the judgment, holding "that the evidence tended to prove a system or scheme on the part of the defendant to defraud the corporation by embezzling its funds." That case falls within a recognized exception to the general rule that testimony tending to prove the commission of other crimes is not competent on the trial of a criminal charge. It is not easy to say in every case whether such a system or scheme has been established as will render proof of other like crimes competent; but the rule should not be extended to include cases where nothing further is shown than that the defendant obtained money from various parties by means of a similar false pretense, unless there is something unusual or extraordinary in the means employed. There was no such connection between the different collections made by the appellant as to render proof of all such collections competent on the trial of this information. For this error the judgment must be reversed.

In view of a retrial of the case, we will briefly consider the other errors assigned. The appellant contends that he should have been permitted to prove that he collected the money mentioned in the information under the advice of his attorney. It would doubtless have been competent for the appellant to prove that he collected the money in good faith, believing that he had a right so to do, and that in making the collection he was acting under the advice given by his attorney after a fair and full statement of all the facts. But the offer of the appellant fell far short of these requirements. He simply offered to show by his attorney that the attorney had advised him to collect the money. Whether the advice was given after a full and fair statement of all the facts or was acted upon in good faith, or at all, does not appear. The showing was wholly insufficient, and the offer was properly rejected. The Deming letter and the Freeland check do not

seem to have any relevancy on the trial of this case, and should have been excluded, though their admission would seem to have been harmless error.

For the error in the admission of testimony the judgment is reversed, and a new trial ordered.

HADLEY, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5820. Decided February 19, 1906.]

MARTHA AGNES CREAMER *et al., Respondents,* v. MORAN BROTHERS COMPANY, *Appellant.*[1]

MASTER AND SERVANT—NEGLIGENCE—HOT OIL FROM MACHINERY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—WHEN QUESTIONS FOR JURY. The defenses of assumed risk and contributory negligence are for the jury where the evidence shows that the plaintiffs' decedent was injured while assisting to remove a propeller from a ship, the hub having become tightly fastened to the shaft, the proximate cause being the negligence of the defendant in failing to inspect the hub and learn of a large amount of hot oil therein, together with the act of the superintendent, who struck the hub with a sledge in such a manner as to release the oil, which fell upon plaintiffs' decedent, who was standing with his back to the shaft and who had no knowledge of the presence of the oil, nor that the superintendent was about to strike the hub.

SAME — VICE PRINCIPALS — SUPERINTENDENT — SETTING DANGEROUS AGENCY IN OPERATION. Where a number of men were engaged in removing the propeller from a ship, the shaft of which was tightly wedged in the hub, the act of the superintendent in striking the hub a blow with a sledge, without waring the men in close proximity thereto, thereby releasing a quantity of hot oil confined in the hub, and precipitating the same upon one of the men, is the act of a vice principal and not of a fellow servant, in that it put in operation an agency fraught with danger, without warning to the men.

DEATH—DAMAGES—EXCESSIVE VERDICT. A verdict in favor of a widow and three minor children for damages for the death of a husband and father in the sum of $13,500 is excessive and should be reduced to $8,000, where it appears that the deceased was 48 years old, earning $3.50 per day, and had once abandoned his family

[1]Reported in 84 Pac. 592.

for a time, and at the time of the accident had left his home, and his wife did not know of his whereabouts nor learn of the death until eleven days thereafter.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 5, 1905, upon the verdict of a jury rendered in favor of the plaintiffs for $13,500 damages for the wrongful death of an employee. Affirmed, upon condition of remitting $5,500.

Kerr & McCord, for appellant.

Brady & Gay and *Wooten & Welch (Dudley G. Wooten,* of counsel), for respondents.

Root, J.—Respondents are, respectively, the widow and minor children of John C. Creamer, deceased, and bring this action to recover damages on account of his death, which is alleged to have been occasioned by the negligence of appellant, for whom and in whose shipyards he was working. The case was tried in the superior court before a judge and jury, a verdict of $13,500 returned, and judgment entered thereupon. From this judgment an appeal is taken.

The facts are about as follows: Said Creamer with several other workmen, under the immediate direction of one or two of the foremen or superintendents of the defendant, was assisting to remove the propeller from a certain steamship that was then upon the ways in said shipyard. The hub of the propeller had become so tightly fastened to the shaft that it could be removed only with great difficulty. After applying the usual and ordinary methods to no avail, the foreman directed that a fire be built and kept immediately under the hub in order that the latter might be heated and thereby expanded, while at the same time a stream of cold water was kept running upon the shaft that ran through the hub. Some time after this fire had been heating the hub, oil was seen to be running from the cavity of said hub. The latter was about two feet in diameter and something over thirty inches

in length, and was to a considerable extent hollow. The hollow place or places in the hub had been filled with tallow, and it was by reason of the melting of this tallow that the said oil was caused to run therefrom. The running of said hot oil, after being kept up for some time, appeared to practically cease, and it seemed to be the general opinion of all engaged that it had probably all run out. No inspection, however, appears to have been made by the foreman or superintendent in charge, or by any one, as to how much oil there was in the hub or as to whether or not it had all escaped.

While the fire was still being kept up and the propeller still unyielding, the superintendent or foreman ordered some of the men, including Creamer, to elevate a "ram," which was a heavy piece of iron, about a foot in diameter and two or three feet long, with a long narrow handle projecting several feet beyond this. This ram could be raised by means of block and tackle to a position where it would be on a line with the shafting, and could be swung back and forth and made to strike the end of the shaft so as to produce a jar which it was hoped might have the effect of loosening the propeller from the shaft. While Creamer and four or five other men were pulling on the ropes to raise this ram, and while he was standing, with his back toward the shaft, on a scaffolding which had been built up under the stern of the ship so that the men working about the propeller could reach the same and handle their work thereabout, one of defendant's superintendents took a large sledge and struck the hub of the propeller a blow, which had the effect of loosening the hub from the shafting and causing it to slide down toward the end of the shaft, thereby precipitating from the heated hub a large amount of hot oil, which struck Creamer in the back and ran over his body, producing burns which caused his death some weeks later.

The defendant denies that there was any negligence on its part, and alleges affirmatively the defenses of assumed risk, contributory negligence, and fellow servant. Under numerous decisions of this court, we think that the issue upon each

one of these matters was, under the evidence introduced, one of fact, and the evidence is such that we cannot review the jury's action. The negligence of the defendant which constituted the proximate cause of this unfortunate injury consisted in its neglect to inspect the hub and learn of the large amount of hot oil therein contained, together with the act of its superintendent in striking with a sledge this hub in such a manner as to precipitate this hot oil against the person of Creamer at a time when his attention was absorbed in a different direction.

As to assumed risk, a workman assumes those dangers which are open and apparent and of which he knows or of which, by the exercise of ordinary care and prudence, he should know, and such as he knows or ought to know to be naturally and necessarily connected with his work. In this case the facts and evidence were such that it was for the jury to say whether or not he knew or ought to have known that the hub contained more oil than had escaped, and such a quantity as to be dangerous when the hub should become loosened, and to say whether or not under the circumstances he knew, or by the exercise of reasonable care should have known, that the superintendent was about to strike the hub in a manner that might loosen the same and precipitate the hot oil upon him.

As to contributory negligence, it appears from the evidence in behalf of respondents that Creamer was engaged with the other men in helping to raise the ram. His back was toward the shaft and propeller. He had hold of the rope, pulling with the other men and giving his attention to the work that he and they were engaged in. The evidence tends to show that he did not know whether or not there was any more oil in the hub, or as to whether or not there was a sufficient amount to endanger his safety, and that he did not know that the superintendent was to strike the hub at that time. On account of these things, and of all the established circum-

stances, the question of whether or not he was guilty of contributory negligence became one for the jury.

It is urged by appellant that the act of the superintendent in striking the hub with the sledge at the time and in the manner in which he did, constituted an act of a fellow servant of Creamer; that such an act, although performed by the superintendent, was not one of superintendence, was not one of the non-delegable duties of the master, was not the act of a vice principal; but was the manual act of one working with Creamer in the same undertaking and to accomplish the same end toward which they were all working; that in striking said blow said superintendent was, for the time being, a fellow workman of Creamer, and that his negligence as such would not render the appellant company liable. This argument would appeal strongly to the writer of this opinion were it not for the former decisions of this court. *Nelson v. Willey Steamship etc. Co.*, 26 Wash. 548, 67 Pac. 237; *Dossett v. St. Paul etc. Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114. Under the authority of those decisions, when the superintendent, without the knowledge of the workman, negligently set in operation an agency fraught with danger, he thereby rendered the company liable for the result of such negligence.

Upon the questions of appellant's negligence and of Creamer's contributory negligence and of assumed risk, there was some conflict of evidence—in fact, a sharp conflict as to some matters bearing upon these questions. But as to every one of these issues, respondents introduced a substantial amount of competent and material evidence, sufficient, if believed, to sustain their contention. It not appearing by the record, as a matter of law, that this evidence was false or unbelievable, and the jury having deemed it credible, and the trial court having denied a motion for a new trial, it is not for us to decide where the preponderance of evidence lies, but we must accept the jury's verdict.

Appellant assigns several errors upon the matter of the

giving of certain instructions and the refusal to give others. While the action of the court in some of these matters may have been technically erroneous, yet we find no substantial error, none which we think could possibly have misled the jury, and none constituting reversible error.

It is urged by the appellant that the verdict herein was excessive. We think this contention must be sustained. Mr. Creamer was forty-eight years old, and earning the sum of $3.50 per day. The record shows that he had once abandoned his wife and family for a time. It also appears that he had again left his home some time prior to the accident, and that his wife did not know of his whereabouts at the time of the accident nor learn of it until eleven days thereafter. In the light of all of the evidence in this case, we think that the judgment of the lower court should be reduced to $8,000.

It is therefore ordered that this case be remanded to the superior court, and that respondents be given thirty days from the time of the filing of the remittitur in the superior court within which to remit all over and above the sum of $8,000, in which amount the judgment will then stand affirmed. If said remission be not made within that time, then the trial court is directed to enter an order granting a new trial. If said remission is made, then no costs shall be allowed to either party upon this appeal. If said remission is not made, appellant shall have costs in this court.

MOUNT, C. J., DUNBAR, HADLEY, RUDKIN, FULLERTON, and CROW, JJ., concur.

the summons, exclusive of the day of said first publication, and defend the action or pay the amount due."

We do not think there was a substantial compliance with this statute. The summons as published leaves it indefinite and uncertain as to the time within which appellant was required to answer. This is fatal to its validity under former decisions of this court. *Thompson v. Robbins,* 32 Wash. 149, 72 Pac. 1043; *Smith v. White,* 32 Wash. 414, 73 Pac. 480; *Woodham v. Anderson,* 32 Wash. 500, 73 Pac. 536; *Young v. Droz,* 38 Wash. 648, 80 Pac. 810; *Dolan v. Jones,* 37 Wash. 176, 79 Pac. 640; *Sturgiss v. Dart,* 23 Wash. 244, 62 Pac. 858.

The judgment of the honorable superior court is reversed, and the case remanded with instructions to overrule the demurrer and permit appellant to defend the action or make payment.

MOUNT, C. J., FULLERTON, DUNBAR, CROW, and HADLEY, JJ., concur.

[No. 5755. Decided February 23, 1906.]

NANCY PATTEN, *Respondent,* v. THE TOWN OF AUBURN, *Appellant.*[1]

TRIAL—COMMENT ON FACTS. In an action for personal injuries against a town, where the attorney for the defendant, in his argument to the jury, stated that the plaintiff had presented her claim to the town, it is unlawful comment upon the evidence, in violation of Const., art. 4, § 16, for the court, in sustaining the objection to such argument, to state in the presence of the jury that there was no evidence of the presentment to the town of any claim, when in fact there was evidence that a claim, verbal or written, had been presented to the town.

Appeal from a judgment of the superior court for King county, Hatch, J., entered March 3, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for

[1]Reported in 84 Pac. 594.

damages for personal injuries sustained in a fall upon a sidewalk. Reversed.

I. B. Knickerbocker and *Graves, Palmer, Brown & Murphy,* for appellant.

Douglas, Lane & Douglas, for respondent.

Crow, J.—This action was brought by respondent, Nancy Patten, against appellant, the town of Auburn, a municipal corporation of the fourth class, to recover damages for personal injuries alleged to have been sustained by a fall on one of the public sidewalks of said town. Respondent alleged that the accident occurred on September 30, 1903, while she, in company with two other ladies, was walking along Cedar street. She contends that by said accident she was permanently crippled in one of her knees, and also sustained other injuries. Trial was had before a jury, which rendered a verdict in respondent's favor in the sum of $1,250. A motion for a new trial, and motion for judgment *non obstante veredicto,* having been denied, judgment was entered upon said verdict, and this appeal has been taken.

Many assignments of error have been made, but it is unnecessary for us to refer to any except the assignment that the court erred in overruling appellant's motion for a new trial. In support of this contention appellant first insists that the evidence offered to show constructive notice to the town of the unsafe condition of the sidewalk was insufficient, it not being contended that any actual notice had been given. We will not enter into a detailed discussion of the evidence on this point, as we find a sufficient conflict existed to authorize the submission of this issue to the jury for its determination.

In further support of said assignment, appellant contends the trial court erred in commenting on the evidence in the presence of the jury. Respondent's injuries were alleged to have been sustained on September 30, 1903. It appeared from undisputed evidence that immediately after her fall she

proceeded to a place of business in the town of Auburn, and thereafter returned to her home, walking with the two ladies who accompanied her; that, after arriving at her home, she complained of considerable pain and soreness in her right knee. She did not call a physician for a period of two weeks, nor did she again consult a physician until after another period of two weeks. She complained of no other injuries until about January of the following year. There was a dispute in the evidence as to whether the condition of her knee might not have resulted from previous rheumatic trouble; also as to whether her other ailments were not of a chronic and long-standing nature, existing prior to the accident. The evidence of physicians who testified was conflicting on these points. It appears the appellant, at the time of her alleged injury, was keeping a boarding house, having about eight boarders and doing her own work. She continued to keep boarders until the following January; but stated that in the meantime she had employed servants to assist her. About January she quit keeping boarders, her contention being that she was compelled to terminate the business by reason of the severity of her injuries. On respondent's cross-examination, counsel for appellant endeavored to show that her alleged injuries were feigned, were not the result of her fall, and that her claim against the municipality was not prosecuted in good faith. On such cross-examination she testified, in part, as follows:

"Question: After he [the last servant employed by her] left whom did you get? A. I quit when he left. Q. That is when you gave up? A. That is when I gave up. Q. Now, that was in January, was it, when you gave up the boarding business? A. Yes sir. Q. What day in January? A. I think it was the middle of January. Q. Now, that was a little after you had determined to look to the city for damages, wasn't it? A. A little after. Q. You had made up your mind that you would ask the city to pay you damages for this accident at that time, hadn't you? A. No, I didn't ask them until I quit. I didn't ask them until the 18th of

January. Q. Now, are you sure about that, Mrs. Patten? A. Very sure about it. Q. That was of course this year? A. Yes, that was this year. Q. What day did you say that was? A. Well, now, as near as I can remember, I think it was the 18th."

It further appears from her cross-examination that she had consulted an attorney in the city of Seattle some time in the month of December following the accident. This action was not instituted until June 11, 1904. The statement of facts shows that appellant's attorney, in his argument to the jury, asserted that respondent, in January, presented her claim to the town for injuries alleged to have been sustained. Thereupon counsel for respondent objected to said statement, which objection the court sustained, and stated to the jury that there was no evidence of the presentment to the town of any claim by respondent. To this statement of the court appellant, by its counsel, at the time excepted. Appellant now contends that this remark of the court, made to the jury during the argument of counsel, was a comment upon the evidence, in violation of the provisions of art. 4, § 16, of the constitution, which reads as follows: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Evidently it was not the intention of the framers of the constitution that this provision should impose any undue restraint upon a trial judge in passing upon the competency or admissibility of evidence, or in instructing the jury as to the law. We think their intention was to provide against any undue influence being exerted upon the jury by the judge communicating to them his opinion as to facts proven or not proven by the evidence. The honorable trial judge, in making this statement to the jury, undoubtedly had in mind the fact that, by the charters of cities of the first class in this state, it is provided that, before an action of this character can be brought, a written claim must be presented to the city authorities within a limited time. There is no such provision in the

law pertaining to cities of the fourth class, and in this instance it was not necessary to present any written or formal claim to the municipal authorities. Yet, from the cross-examination of respondent, we infer that she had in fact presented a claim. Whether it was oral or written does not distinctly appear. Although, as a condition precedent to the bringing of this action, it was immaterial whether she had presented any claim whatever; still this evidence became material as affecting her credibility as a witness, as tending to show whether she had acted in good faith, and whether she had, prior to January, 1904, honestly claimed to have suffered the injuries alleged in her complaint.

In *State v. Walters,* 7 Wash. 246, 34 Pac. 938, 1098, this court said:

"It is not the *quantum* of any particular comment, but all comment whatever, that is inhibited by the constitution; and, therefore, courts should be extremely careful to confine their instructions solely to declaring the law. All remarks and observations as to the facts before the jury are positively prohibited, and if any such are made, the judgment will be reversed unless the appellate court can see that the accused was in no wise prejudiced thereby."

In *Drumheller v. American Surety Co.,* 30 Wash. 530, 71 Pac. 25, it appeared that, when instructing the jury, the trial judge omitted any mention of a contested item of a certain door until his attention was called thereto by counsel for the plaintiff. Thereupon one of the jurors asked the court what kind of a door had been furnished, and the judge replied: "I think the testimony is silent as to that point, as to the kind of a door it was. You will simply have to determine that matter from the testimony in the case. I do not think there is any testimony about it." In fact, the evidence was silent on the question, yet the appellant assigned error on this remark of the court as being a comment on the evidence. In passing upon such assignment, this court said:

"It is always proper for the court to state to the jury that there is no evidence as to a certain matter, when, as in this

case, such is the fact. But it is for the jury alone to determine the weight of the evidence submitted to them, without interference or suggestion on the part of the court."

In this case the evidence was not silent as to the matter involved, as there was testimony tending to show a claim of some kind had been presented to appellant on January 18, 1904, and the evidence was material. When the trial judge made the statement of which appellant complains, he commented upon matters of fact in the presence of the jury, and in so doing committed prejudicial error.

Other assignments of error are made which are based upon instructions either given or refused. We have carefully examined the entire body of the instructions contained in the record, and find that the law was fairly and properly given to the jury. For the error above mentioned, the judgment is reversed and the cause remanded for a new trial.

MOUNT, C. J., HADLEY and DUNBAR, JJ., concur.

ROOT, J., having been of counsel, took no part.

[No. 5896. Decided February 23, 1906.]

JOSEPH O'NEIL, *Respondent*, v. KATE LINDSEY *et al.*, *Defendants*, MARY HURLEY, *as Executrix etc.*, *Appellant*.[1]

NEW TRIAL—CONTINUANCE—SURPRISE. In an action upon a promissory note brought against the wife, as executrix of the estate of her husband, one of the joint makers of the note, in which the plaintiff had alleged payments tolling the statute of limitations, without specifying by whom the payments had been made, the defendant is entitled to a continuance of the case or a new trial, where the court had denied her motion to make the complaint more definite and certain by stating by whom, to whom, and when the payments had been made, and where it appears that she was surprised at the trial by the evidence of a witness who claimed to have acted as agent of the holder of the note, and who testified to a payment of $2 made by the deceased in September, 1897, at the city of S. which was the

[1]Reported in 84 Pac. 603.

payment relied upon by the plaintiff to toll the statute; and where the defendant testified at the trial that the deceased had been a helpless invalid since 1896, unable to attend to any business or make any payments on the note, and that he had not been at the city of S but once since 1896, when she accompanied him, and that she could not state at the time what year that trip was made, but would be able to do so if time was given to communicate with parties at S; and after the trial affidavits were produced to the effect that the aforesaid trip to S had been made in April 1900.

Appeal from a judgment of the superior court for Mason county, Linn, J., entered April 21, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action upon a promissory note. Reversed.

J. W. Robinson, for appellant.

Phil Skillman and *G. C. Israel,* for respondent.

HADLEY, J.—This is an action to procure a judgment upon a promissory note, and to foreclose a mortgage given to secure the same. It is alleged, that the note was for $282.50, dated February 1, 1896, payable three months after date, and executed by Kate Hurley, now Kate Lindsey, and also by Mary Hurley and Dennis Hurley; that the mortgage was executed on the same date by said Kate Hurley; that both note and mortgage were made to Hobart G. Hagan, as payee and mortgagee, respectively; and that plaintiff, by assignment, is the holder thereof. It is alleged that certain payments were made upon the note. Dennis Hurley having died, testate, before the commencement of this suit, the said Mary Hurley was made defendant in her own right, and also as the executrix of the will of the deceased Dennis Hurley. Kate Hurley was made defendant under her present name of Kate Lindsey, together with her husband Price Lindsey. It is alleged that, prior to this suit, the claim based upon the note was duly presented to the said executrix, and by her rejected.

The defendants moved the court to require the complaint

to be made more definite and certain, in the particular that plaintiff should state by whom, to whom, and upon what dates the payments alleged to have been made were made. The motion was denied. The said executrix answered separately, denying the material allegations of the complaint, and pleading the statute of limitations. The defendants other than the executrix answered similarly by separate pleading. The cause was tried by the court without a jury. The defendants other than the executrix were dismissed from the action, foreclosure was denied, and judgment was rendered against the executrix for $787.69 and costs, from which she has appealed.

It is assigned that the court erred in not sustaining appellant's motion to make the complaint more definite and certain with respect to the allegations as to payments, and also in refusing to re-open the case for further testimony, or for a new trial. The complaint showed upon its face that the note was barred by the statute of limitations, in the absence of payments thereon. There were three makers of the note, and while the complaint alleges that payments were made, yet it does not allege by whom or to whom they were made. It is alleged that a payment of $2 was made in September, 1897, the day not given. It is upon this alleged payment that respondent relies to prevent the bar of the statute. To make such payment binding upon the deceased Hurley in the way of tolling the statute, it was necessary that it should have been made by him, or by his authority, and with his knowledge and consent. He being dead, it was but reasonable that respondent should have advised the executrix if he claimed that the payment was made by the deceased. The court having declined to require this, appellant was met at the trial by the testimony of a witness who claimed that, acting as agent of the holder of the note, she received from the deceased Hurley, at Seattle, in September, 1897, $2 as a paymnt upon the note. The witness admitted that the indorsement upon the note of the credit for the alleged pay-

ment was made in her own handwriting, and that it was not placed there until a short time before this suit was brought, about five and one-half years after she claims the payment was made.

The executrix, who is the widow of the deceased Hurley, was surprised by this testimony. She testified that, soon after the note was given, the deceased became so afflicted physically and mentally that he could not transact any business, and that from some time in 1896 she transacted all the business for the two, and did so continually to the time of his death in July, 1902; that during those years her husband never left home unless she was with him; that he never had to exceed twenty-five or fifty cents in money with him at any one time during those years; that he was never in Seattle but once after 1896, and that she was with him during that time; that he could not have made the alleged payment in Seattle without her knowledge, and that she had no such knowledge. She could not then remember certainly the year that they made the trip to Seattle, but stated that if she could be allowed to communicate with certain parties in Seattle, she could show by them the date when her husband was there, and the only time he was there after 1896.

After the trial, she produced affidavits to the effect that the aforesaid trip to Seattle was not made in the year 1897, but was made in April, 1900. She asked that the case might be reopened, or that she might have a new trial, in order that she might introduce testimony upon the above subject, shown by the affidavits to be available. This was denied. We think, in view of the fact that the court had denied the motion to make the complaint more definite upon the subject of payments, that it was error to deny appellant the opportunity she asked. The cause was tried by the court, and could easily have been re-opened if a full new trial was thought unnecessary. If the complaint had been made more definite, appellant might have been apprised before the trial of what she was required to meet. But, as it was, she clearly did not

know until the witness who claims to have received the payment had testified. If the deceased was not in Seattle in the year 1897, then the payment could not have been made as testified by the witness. Under all the circumstances, we think appellant is entitled to introduce the proposed testimony.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

MOUNT, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 5997. Decided February 23, 1906.]

MERCHANTS BANK OF PORT TOWNSEND, *Appellant*, v. SUPERIOR CANDY & CRACKER COMPANY, *Respondent*.[1]

MONEY RECEIVED—MISTAKE—ELECTION—NOTE FROM ONE OBLIGOR—JOINT LIABILITY—ESTOPPEL. Where by mistake a bank book belonging to a depositor in a bank came into the possession of another party of the same name, who had no right thereto, and the bank by mistake paid the amount of the deposit to such other party, who subsequently paid over part of the money to a corporation whose officers had full knowledge of the mistake, the bank may recover such money from the corporation, and the fact that the bank had taken a note from the party to whom the same had been first paid, and had undertaken to collect the same from such party, would not amount to an election to accept him as the sole creditor, or estop the bank from collecting from the corporation the portion of the money which it had received.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 8, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to recover money received by mistake. Reversed.

Emmons & Emmons and *H. T. Granger*, for appellant.

Harrison Bostwick, for respondent.

[1]Reported in 84 Pac. 604.

ROOT, J.—Appellant is a banking corporation, doing business at Port Townsend. Respondent is engaged in the wholesale candy and cracker business at Seattle. One George Blake, residing at or near Center, in Jefferson county, had on deposit in appellant's bank $365.60. One George W. Blake and wife, formerly living in the vicinity of Center, have for several years resided at Bellingham, where they were engaged in business, and were in March, 1903, indebted to respondent in the sum of $225, for goods, wares, and merchandise theretofore purchased. In March, 1903, appellant bank balanced the pass book of George Blake, showing a balance of $365.60 to his credit, and forwarded said book by mail to him at Center. For some reason not disclosed, the postmaster, instead of delivering the book to George Blake, forwarded the same to Bellingham, where it was received through the mail by Mrs. George W. Blake. The latter examined the book without first informing her husband of its receipt, and found that it showed deposits of small sums from time to time during the years 1901, 1902, and 1903, and also found in the book a return check which had been drawn by George Blake upon his account and paid by the bank. Mrs. George W. Blake conceived the idea that her husband, without her knowledge, had been drawing small sums from their business and depositing the same in this bank. She said nothing at this time to her husband about the matter.

Shortly thereafter one Foster, the president of the respondent company, went to Bellingham and urged Mrs. Blake to pay the amount due his company. She pleaded her inability to pay, and showed Mr. Foster this pass book, and told him of her suspicions about her husband taking money from their business. Foster and Mrs. Blake then interviewed her husband George W. Blake, and exhibited to him the pass book, and charged him with withdrawing money from the business and secreting it in this bank, and insisted upon his using this money to pay the debt due the candy company. George W.

Blake protested that the charge was unfounded; that he had no money in the bank, and that the pass book did not belong to him; that he had never seen it before, and that he had no dealings whatever with the bank. Foster by his insistence seems to have convinced said Blake that he had money in said bank.

It seems that Blake's mother-in-law, some years before, had given some intimation to the effect that she would make Blake's son, whose name was George Blake, one of her heirs; and George W. Blake, under the influence of the argument of Foster and Mrs. Blake, strengthened by the presence of the pass book, was led to believe that perhaps some money might have been left at the bank by his mother-in-law for his son; and at the instance of Foster and his wife, drew a draft on the appellant bank for $365.60. He was then at the bank of Whatcom in company with Foster, and the draft was presented to Mr. Post, the cashier of the bank just mentioned. Mr. Post sent a telegram to the appellant bank, asking if the draft was good. As received, the name in the telegram read "J. W. Blake." The appellant bank replied by telegraph that it had no such account. Foster then took the pass book and went to Port Townsend, and showed the appellant bank the pass book, and asked why it had sent such a telegram. The cashier of appellant bank called Foster's attention to the fact that the pass book was in the name of "George Blake," while the name in the telegram was "J. W. Blake." Shortly thereafter George Blake, the son of George W. Blake of Bellingham, sent a telegram to the appellant bank, instructing it to forward to the bank at Bellingham any money due him. Appellant bank, supposing this telegram to have come from their depositor George Blake, forwarded the entire deposit to the bank at Bellingham. Shortly thereafter Foster visited Bellingham, and received from George W. Blake a check for $225, in payment of the amount due from George W. Blake and his wife to respondent company. This check was paid to Mr. Foster out of the money

sent by appellant bank to the bank at Whatcom. Said Blake, also, out of the same fund, paid Foster $75 for goods which Mrs. Blake had ordered a month or so prior. Some time thereafter the appellant bank discovered that it had paid this money to the wrong person, and was required to pay to George Blake, of Center, the money due him. One Strong, the cashier of appellant bank, went to Bellingham and took from George W. Blake a note for the amount which had been paid by mistake as aforesaid, and undertook to collect from the candy company the amount which had been paid to it out of this fund. Foster had given George W. Blake a receipt for $300. Strong arranged with said Blake to place this receipt in the hands of the Whatcom bank, to be surrendered to the candy company if the latter returned the money to appellant. Respondent refused to pay the money back. Thereafter George W. Blake or wife made payments aggregating $40 in amount upon said note. This action was brought to recover $300 received by respondent as aforesaid. Trial was had before the court without a jury. Findings of fact and conclusions of law were made and entered favorable to respondent, and a judgment in its favor entered. From this judgment an appeal is taken.

It is the contention of the respondent that the appellant, by taking the note from George W. Blake and receiving payments thereupon, thereby elected to accept him as its debtor, and that it must consequently look solely to him. We cannot uphold this contention. The fundamental fact in this case is that the respondent received $300 of appellant's money for which the latter has received no consideration whatever. It received the same as the result of mistake on the part of appellant. We can see no reason in law or morals why the respondent should be permitted to hold this money. Respondent's president was present when the pass book was first called to the attention of George W. Blake, and heard the latter's statement that the book was not his; that he had no money in that bank; that he had never done business there.

Foster knew, or was in a position to have ascertained, every fact and circumstance connected with the transfer of this money. His knowledge, of course, is imputed to the respondent company, of which he was president. It is perfectly apparent that he and his company had no good reason to believe that the money belonged to George W. Blake or wife. That the pass book was in the name of George Blake, and that it contained a check with the signature of George Blake of Center, were in themselves sufficient facts to have put Foster and his company upon inquiry that would readily have informed them as to the ownership of this money.

The judgment of the honorable superior court is reversed, and the cause remanded with directions to enter judgment in appellants favor, in the sum of $300, and costs.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 6010. Decided February 23, 1906.]

ALLEN WEIR, *Appellant, v.* THE SEATTLE ELECTRIC COMPANY, *Respondent.*[1]

CARRIERS—NEGLIGENCE—PASSENGER ALIGHTING FROM STREET CAR—QUESTION FOR JURY. In an action for personal injuries sustained in falling from a street car, it cannot be said as a matter of law that the street car company was free from negligence or that the plaintiff was guilty of contributory negligence, and it is error to direct a verdict for the defendant, where there was a conflict in the testimony as to the custom of stopping cars on the far side of a certain street intersection, and it appears from the plaintiff's testimony that, after having stopped at the switch on the other side of the intersection, the plaintiff informed the conductor that he desired to stop at said street, and insisted upon his right to do so, whereupon the conductor signalled to the motorman to stop the car, and the plaintiff took his position on the lower step with his hand on the extension rod to alight, while the car was slowly approaching the

[1]Reported in 84 Pac. 597.

far side of the street; that instead of stopping, the speed of the car was increased 8 or 10 miles an hour, and the plaintiff was thrown or hurled from the same, without fault on his part; since notwithstanding conflicting evidence, the testimony of the plaintiff must be accepted and the jury might infer therefrom that the failure to stop the car in obedience to the signal was the proximate cause of the injury, and that the plaintiff had a right to presume that the car would come to a stop, and to act upon that presumption.

TRIAL—TAKING CASE FROM JURY—PREPONDERANCE OF EVIDENCE. The rule that the trial court is justified in taking a case from the jury where the testimony so strongly preponderates that it would have been its duty to set aside a verdict in favor of the plaintiff, does not prevail in this state, since here the granting of a new trial rests in the discretion of the trial court and to concede the same power in directing a judgment would practically abrogate trial by jury.

SAME—NONSUIT—DIRECTING VERDICT—EFFECT. If the court would not be warranted in granting a nonsuit it would not be warranted in directing a verdict for the defendant, there being no substantial difference between the two judgments except that one is *res judicata* and the other is not, unless based upon an affirmative finding.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered July 8, 1905, upon the verdict of a jury rendered in favor of the defendant by direction of the court, after a trial on the merits, in an action for personal injuries sustained by a passenger in a fall from a street car. Reversed.

Brady & Gay, for appellant.

Hughes, McMicken, Dovell & Ramsey, for respondent.

RUDKIN, J.—On the evening of December 15, 1904, the plaintiff became a passenger on one of the defendant's First avenue cars, in the city of Seattle, with a view of reaching his home on Virginia street. First avenue and Virginia street intersect at right angles. Immediately south of the south line of Virginia street there is a switch on the First avenue line where the cars turn from First avenue into Virginia street. The outgoing cars on the First avenue line stop at this switch, but do not, as a rule, stop on the north side of

Virginia street. The incoming cars, on the other hand, stop at the north side of Virginia street, but do not on the south. In other words, the general rule that cars stop on the far side of intersecting streets is here reversed. Up to this point there is no conflict in the testimony, except as to the custom of stopping outgoing cars on the north side of Virginia street.

The plaintiff testified that he got off the car at that point a number of times, while the employees of the defendant testified that the cars rarely stopped there. The plaintiff further testified that he was riding on the back platform of the car, talking to a friend and waiting for the conductor to call out Virginia street. The car stopped at the switch at the south side of Virginia street and, as the car started up, the plaintiff touched the conductor on the elbow, inquired if that was Virginia street, and informed him that he desired to get off there. The conductor replied that the car would not stop again until it reached Lenora street, which is the next street beyond Virginia. The plaintiff protested against this, and said: "Lenora nothing; I get off here." The conductor thereupon gave one bell, which is the usual signal to stop the car, and the plaintiff made his way across the platform and took a position on the lower step of the car, with his left hand on the stanchion, so as to be ready to alight when the car reached the north side of Virginia street. At the time the signal to stop was given, the car was moving slowly into Virginia street, and by the time the plaintiff reached the lower step the car was about the middle of the street. Instead of stopping at the north side of Virginia street, the car increased its speed so that by the time it reached that point, or very soon thereafter, it was going at the rate of eight or ten miles an hour. The plaintiff in some manner slipped or was thrown from the car receiving the injury complained of. The plaintiff was corroborated, in a measure, by the person with whom he was conversing just before leaving the car.

The defendant, on the other hand, called the conductor, the motorman, and several passengers who were on the car at the time, all of whom testified that the signal to stop the car was not given until the car had passed beyond the north side of Virginia street, and some of whom testified that the plaintiff voluntarily stepped or jumped from the car. At the close of all the testimony the court discharged the jury and directed a judgment for the defendant. From this judgment the plaintiff appeals.

In determining whether the court erred in withdrawing the case from the jury we must accept the appellant's theory of the case, in so far as there is testimony to sustain it. We must assume that the conductor signalled the motorman to stop the car just as it was entering Virginia street, at a slow rate of speed; that the appellant made his way across the platform and took his position on the lower step of the car, with his hand on the stanchion so as to be ready to alight when the car came to a stop in obedience to the signal; that instead of stopping, the motorman increased the speed of the car so that it had attained a speed of from eight to ten miles an hour at, or soon after, reaching the the north side of Virginia street; and that the appellant was hurled or thrown from the car without fault on his part.

Was there no evidence of negligence here, as a matter of law, or was this an exercise of the highest degree of care consistent with the practical operation of a street railway? A person who voluntarily rides on the steps of a street car assumes the ordinary risk incident to his position, and if injured through the ordinary jerking or jolting of the car, he cannot recover; but the appellant was not riding on the car step voluntarily, nor was he guilty of negligence, as a matter of law, in making his way to the step after the signal to stop was given. We may take judicial notice of the fact that this is a common practice in all street car traffic. The appellant assumed the risk arising from the ordinary jerking or jolting of the car in reaching the stopping place, but he did

not assume any risk arising from the negligence of the respondent or its servants.

The negligence on the part of the respondent consisted in this: the servants in charge of the car led the appellant into a place of more or less danger and threw him off his guard. In other words, the appellant had a right to presume that the car would come to a stop at the north side of Virginia street, and to act upon that presumption. The jury might infer from this testimony that the failure to stop the car in obedience to the signal was the direct and proximate cause of the appellant's injury. It cannot be said, as a matter of law, that the appellant was guilty of contributory negligence. Indeed the respondent does not so contend. It cannot be said that the appellant assumed the extra hazard arising from the failure of the respondent to stop the car, as it was in duty bound to do, nor in our opinion can it be said, as a matter of law, that the respondent was entirely free from negligence which contributed approximately to the injury. As above stated, we have thus far assumed that the appellant's testimony is true. Of course, if the signal to stop the car was not given until after the car passed beyond Virginia street, or if the appellant voluntarily stepped or jumped from the car, or was otherwise guilty of contributory negligence, he cannot recover.

The respondent further contends that the preponderance of the testimony was so strongly in its favor that it would have been the duty of the court to set aside a verdict in favor of the appellant, had one been found or returned, and that the court was therefore justified in directing a judgment in the first instance. Judging from the number of witnesses alone, and that is practically the only guide we have, it will readily be conceded that a preponderance of the testimony was with the respondent, but that alone would not justify the action of the trial court. Doubtless, in some jurisdictions the rule prevails that if the court would set aside a verdict in favor of one of the parties as against the evidence, it may

direct a verdict or judgment in favor of the adverse party, but that rule does not obtain in this state. We have uniformly held that the granting of a new trial rests in the discretion of the trial court, and if we concede to the trial courts the same power or discretion in directing judgments, the right of trial by jury will be practically abrogated. The power of a superior court to direct a judgment is practically commensurate with its power to direct a nonsuit. The only substantial difference between the two judgments is, that the former is *res adjudicata,* while the latter is not, unless based upon some affirmative finding. Cases may arise in which a plaintiff's *prima facie* case is so fully explained and controverted as to leave no substantial conflict in the testimony, but ordinarily testimony which is sufficient to carry a case beyond a nonsuit will carry it to the jury at the close of the testimony. In construing the statute under which the court directed the judgment appealed from, in *Spokane etc. Lumber Co. v. Loy,* 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119, the court said:

"We do not think it was the intention of the legislature in enacting this statute to empower the superior courts of the state to determine matters of fact such as are usually determined by a jury, but simply to authorize the taking of a case from the jury when the facts are so clearly established that the court can see, as a matter of law, what the verdict and decision should be. In other words, where the court would not have been warranted under the prior statute in granting a nonsuit, it would not, we think, be justified under this statute, in taking the case from the jury and directing a judgment to be entered."

We think that under the testimony the court should have submitted the case to the jury, and if dissatisfied with the verdict, its power was limited to the granting of a new trial.

The judgment of the court below is therefore reversed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5920. Decided February 23, 1906.]

J. E. CHILBERG, *Appellant*, v. JOHN SIEBENBAUM *et al.*, *Respondents.*[1]

CORPORATIONS—INSOLVENCY—SUBSCRIPTIONS—ACTION BY CREDITOR—LIMITATIONS. The right of action in favor of creditors of an insolvent corporation against its stockholders to enforce the stock subscription liability accrues at least as soon as the corporation disposes of all its assets, ceases to do business as a going concern and becomes notoriously insolvent.

SAME—NECESSITY OF CALL OR ASSESSMENT. After the declared or notorious insolvency of a corporation, the liability of the stockholders upon their undue stock subscriptions becomes fixed and immediately due without the necessity for a call or assessment thereon.

SAME—JUDGMENT AND RETURN OF NULLA BONA. Upon the insolvency of a corporation, an action by a creditor upon a demand against the corporation does not suspend the running of the statute of limitations as against stockholders until the recovery of judgment, and the corporate debt is not merged in such judgment, as judgment and return of *nulla bona* is not necessary where it is shown that the same would be futile.

SAME—CONTINUATION OF LIABILITY. The stockholders of an insolvent corporation do not continue liable upon stock subscriptions as long as liability exists against the corporation.

SAME—NOTICE TO CREDITOR OF UNPAID SUBSCRIPTIONS. The creditor of an insolvent corporation cannot claim that his right of action against stockholders upon their unpaid stock subscriptions does not accrue until notice that there were unpaid subscriptions was brought home to him, in the absence of fraud or concealment, since under Bal. Code, § 4269, the creditor had access to the corporate books and opportunity to ascertain the facts.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered June 2, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action against stockholders, brought by a creditor of an insolvent corporation to recover unpaid stock subscriptions. Affirmed.

[1]Reported in 84 Pac. 598.

G. M. Emory (F. R. Conway, of counsel), for appellant. The statute did not begin to run against the plaintiff and in favor of the stockholders until the entry of judgment against the corporation. *Remington Paper Co. v. Hudson,* 64 Kan. 43, 67 Pac. 636; *Holland v. Duluth Iron Min. etc. Co.,* 65 Minn. 324, 68 N. W. 50, 60 Am. St. 480; *Stephens v. Fox* 83 N. Y. 313; *Hawkins v. Glenn,* 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; *Glenn v. Williams,* 60 Md. 93; *Powell v. Oregonian Co.,* 38 Fed. 187. Plaintiff's cause of action did not accrue until execution was returned unsatisfied. 1 Cook, Corporations (5th ed.), pp. 394, 395, § 200; *Walser v. Selegman,* 13 Fed. 314; *King v. Pony Gold Min. Co.,* 28 Mont. 74, 72 Pac. 309; *Albright v. Texas etc. R. Co.,* 8 N. M. 422, 46 Pac. 448; *Bayliss v. Swift,* 40 Iowa 648; *Patterson v. Lynde,* 112 Ill. 196; *Scoville v. Thayer,* 105 U. S. 143, 26 L. Ed. 968; Wait, Insurance Corporations, pp. 93, 565, 575. There must be a call or demand on the stock subscription liability before suit. *Bennett v. Thorne,* 36 Wash. 253, 78 Pac. 936; *Glenn v. Williams, supra; Baltimore etc. Turnpike Co. v. Barnes,* 6 H. & J. (Md.) 57; *Curry v. Woodward,* 53 Ala. 371; *Terry v. Anderson,* 95 U. S. 628, 24 L. Ed. 365.

A. W. Buddress, for respondents, cited, *inter alia*: *Bennett v. Thorne,* 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113; *Younglove v. Kelly Island Lime Co.,* 49 Ohio St. 663, 33 N. E. 234; *Hodges & Wilson v. Silver Hill Min. Co.,* 9 Ore. 200; *Sleeper v. Goodwin,* 67 Wis. 577, 31 N. W. 335; *Glenn v. Dorsheimer,* 23 Fed. 695; *Boyd v. Mutual Life Ass'n,* 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. 948, 61 L. R. A. 918; *Salt Lake Hardware Co. v. Tintic Milling Co.,* 13 Utah 423, 45 Pac. 200; *Terry v. Tubman,* 92 U. S. 156, 23 L. Ed. 537; *Zang v. Wyant,* 25 Colo. 551, 56 Pac. 565, 71 Am. St. 145; *Guerney v. Moore,* 131 Mo. 650, 32 S. W. 1132; *Brobston v. Downing,* 95 Ga. 505, 22 S. E. 277; *McDonnell v. Alabama Gold Life Ins. Co.,* 85 Ala. 401, 5

South. 120; *Gibbs v. Davis,* 27 Fla. 531, 8 South. 633; Private Corporation Act, New York, § 24, quoted in *Hardman v. Sage,* 124 N. Y. 25, 26 N. E. 354; *Hirshfeld v. Bopp,* 145 N. Y. 84, 39 N. E. 817; *Fox v. First Nat. Bank,* 9 Kan. App. 18, 57 Pac. 241; *Webber v. Hovey,* 108 Mich. 49, 65 N. W. 619; *Harmon v. Page,* 62 Cal. 448; *Bird & Co. v. Calvert,* 22 S. C. 292; *Parker v. Carolina Sav. Bank,* 53 S. C. 583, 31 S. E. 673, 69 Am. St. 888; 20 Ency. Plead. & Prac., 739, 740.

RUDKIN, J. — This action was brought by a judgment creditor of the Copper River Transportation & Mining Company, an insolvent corporation, to enforce the stock subscription liability of certain of its stockholders. Several defenses were interposed by answer, but only one of these is before us for consideration on this appeal. The answer averred, in substance, that the Copper River Transportation & Mining Company was organized on the 26th day of November, 1897; that prior to the 1st day of April, 1898, said company disposed of all of its property and assets, became insolvent and ceased to do business, and since said 1st day of April, 1898, said company has transacted no business of any kind, has had no property or assets and has been notoriously insolvent and defunct; that a receiver was appointed for said company, as an insolvent corporation, at the suit of the plaintiff's assignor and one Barneson, on the 28th day of October, 1898, and on the 24th day of October, 1900, the receiver was discharged for the reason that there was no longer need for a receivership, there being no property or assets of any kind belonging to said company; that this action was commenced on the 24th day of October, 1904, on a judgment theretofore recovered on certain demand notes executed by said company, under date of March 23, 1898, and that, by reason of the foregoing facts, the action was not commenced within the time limited by law. The court found the facts substantially as alleged in this affirmative defense, found that the action

was not commenced within the time limited by law, and entered a judgment of dismissal. From that judgment, the plaintiff has appealed.

From the foregoing statement it will appear that the only question presented on this appeal is, when does the right of action in favor of the creditors of an insolvent corporation, as against its stockholders, to enforce the stock subscription liability, accrue? We are of opinion that such right of action accrues, at least, as soon as the corporation disposes of all of its property and assets, ceases to be a going concern and becomes notoriously insolvent, and that is as far as we are required to go in this case. In *McKay v. Elwood,* 12 Wash. 579, 41 Pac. 919, the court said:

"We think, also, that from the time of an assignment by a corporation, the obligation of each stockholder to make payment of the amount remaining unpaid on his subscription to stock, or so much thereof as might be necessary to satisfy the indebtedness of the corporation, must be treated as a debt that is presently due, because after the assignment no power remains in the directors to make a call, and it would be contrary to all considerations of right to permit the stockholder thereby to avoid making payment for his stock as against creditors of the corporation."

See, also, Cook, Corporations (5th ed.), 200; 26 Am. & Eng. Ency. Law (2d ed.), 1049; *Terry v. Anderson,* 95 U. S. 628, 24 L. Ed. 365; *Hatch v. Dana,* 101 U. S. 205, 25 L. Ed. 885; *West v. Topeka Sav. Bank,* 66 Kan. 524, 72 Pac. 252; *Hodges & Wilson v. Silver Hill Min. Co.,* 9 Ore. 200; *Swearingen v. Sewickley Dairy Co.,* 198 Pa. St. 68, 47 Atl. 941; *Hardware Co. v. Tintic Milling Co.,* 13 Utah 423, 45 Pac. 200; *Franklin Sav. Bank v. Bridges* (Pa. St.), 8 Atl. 611.

In *Bennett v. Thorne,* 36 Wash. 253, 78 Pac. 936, this court held that a right of action accrued in favor of the receiver of an insolvent banking corporation to recover the superadded or statutory liability of the stockholders upon the declared insolvency of the bank, and that the statute of

limitations commenced to run from that date. Unless there is a distinction between the right of action to enforce the statutory liability of stockholders and the right of action to enforce the stock-subscription liability, that case is controlling here. Counsel for appellant claim there is a distinction, and that such distinction was recognized by this court in *Bennett v. Thorne*. In support of this contention, counsel quote from the opinion in that case as follows:

"As we have above indicated, it is the respondent's contention that the statute of limitations did not begin to run against the liability until the date of the decree ordering the assessment, and a number of cases are cited in support thereof. The cases cited, however, with one exception, are not in point. They relate to the stock subscription liability, or to national bank cases, both of which are governed by entirely different principles from those controlling the liability created by the constitution. The necessity of a call and assessment, on unpaid stock subscriptions, is based solely on the express contract of the parties. *Scovill v. Thayer,* 105 U. S. 143; *Terry v. Anderson,* 95 U. S. 628. The contract of the subscriber to the stock is that he will pay upon a demand by the proper authorities of the corporation. And it has been invariably held that, as to the stock subscription liability, a call or demand must precede the suit."

The rule there stated is no doubt correct, but the necessity for a call or demand is not as general as might be inferred from the language used. Bal. Code, § 4262, provides as follows:

"The stockholders of any corporation formed under this chapter may, in the by-laws of the company, prescribe the times, manner, and amounts in which payments of the sums subscribed by them, respectively, shall be made; but in case the same shall not be so prescribed, the trustees shall have the power to demand and call in from the stockholders the sums by them subscribed, at such time and in such manner, payments or installments, as they may deem proper."

And as between the corporation and its stockholders, so long as the corporation is solvent and a going concern, this statute

will doubtless control. But when the corporation disposes of all its property, ceases to be a going concern and becomes insolvent, the whole situation is changed, the liability of the stockholder becomes fixed and the unpaid stock subscription becomes immediately due. In *Adamant Mfg. Co. v. Wallace,* 16 Wash. 614, 48 Pac. 415, the court said:

"The next objection was that there was no allegation in the complaint that any demand or call was ever made by the trustees of the defendant corporation, or otherwise, or at all, upon the individual defendants, or upon any of them, for the sums respectively subscribed by them and alleged by the complaint not to have been paid, citing *Elderkin v. Peterson,* 8 Wash. 674, (36 Pac. 1089), which case was also an action by a receiver against a stockholder, and is therefore not in point. The creditor has no control over the corporation or its business; is not supposed to know whether calls have been regularly made, or made at all. So it will be readily seen that while this may be a duty of the corporation itself in suing one of its members over whom it has control, the duty should not be imposed upon a creditor. That no calls are necessary before an action can be commenced by a creditor against the stockholder, see 2 Morawetz on Private Corporations, § 821, where the distinctions above referred to are commented on at length. We think the complaint in all respects was sufficient."

See, also, Cook, Corporations (5th ed.), § 108, and authorities above cited. We see no reason why the right of action to enforce the stock subscription liability should not accrue as soon as the right of action to enforce the statutory or superadded liability, and in law we think there is none.

The appellant contends, however, that his action against the stockholders is based on his judgment against the corporation, not upon the original corporate indebtedness which is merged in the judgment, and that his cause of action against the stockholders did not accrue until the recovery of his judgment against the corporation and the return of *nulla bona,* or, at least, until the recovery of the judgment. If this be true, it must be for one of two reasons; first, because his

right of action against the stockholders did not accrue until he exhausted his legal remedies against the corporation by the recovery of a judgment and a return of *nulla bona;* or, second, because the stockholders continue liable as long as a liability exists against the corporation, and cannot interpose the statute of limitations as a defense, unless the statute has also run in favor of the corporation. What we have said is sufficient to demonstrate the fallacy of the first proposition. An action of this kind is in the nature of a creditor's bill, and in the absence of statute, it is not necessary to first obtain a judgment against the corporation, when it is otherwise shown that such a proceeding would be utterly futile and subserve no useful purpose. *Benham v. Ham,* 5 Wash. 128, 31 Pac. 459, 34 Am. St. 851; Cook, Corporations, § 200, and authorities above cited. Nor does the liability of the stockholder continue as long as the creditors may be able to keep their obligations alive against the corporation. As said by the court in *Swearingen v. Sewickley Dairy Co., supra.*

"When does the right of action by the creditors for unpaid subscriptions accrue? Such subscriptions are a fund in the hands of the stockholders charged with a trust for the payment of the corporate debts. This trust does not depend on any statute, but is deduced on general principles of equity from the premise that the capital is publicly pledged to those who deal with the corporation for their security. *Lane's Appeal,* 105 Pa. St. 49, 51 Am. Rep. 166. So long as the corporation is solvent, the whole subscription is due in accordance with its terms, and is payable when and as called by the corporation. But, when the corporation becomes insolvent, the contract between it and the subscriber is terminated, and his debt to it then is only for such part of his subscription as is required to pay the corporate debts. It is a debt, not to it in its own right, but in the right of its creditors. But it would seem that the status of the stockholder as holder of a fund liable at least contingently to the creditors, must be fixed at the time and by the fact of the ascertainment of insolvency. It is the general rule that insolvency fixes the rela-

tive rights of all the parties concerned. From that moment the unpaid subscriptions became part of the assets for payment of the creditors. It is true they are special, or, as they may be called, reserved, assets, not to be put in distribution until the insufficiency of the other assets is shown, but this is no reason why the creditors may not proceed at once to show that fact. In *Franklin Sav. Bank v. Bridges* (Pa. St.), 20 W. N. C. 43 [8 Atl. 611], already cited, it was said by Albright, J., in entering a nonsuit which was sustained by this court: 'Conceding that the unpaid subscription, when realized, would be a fund to be held for the benefit of the depositors and other creditors of the corporation, it is apparent that as soon as the assignment was made, the depositors and creditors were entitled, through the assignee, to demand that the unpaid subscriptions should be paid. . . . The creditors were at that time in the position of one to whom an obligation is due on demand, or who can make demand upon the doing of an act himself.' In *Terry v. Anderson*, 95 U. S. 628, the charter of a bank provided that the stockholders should be individually liable for the bills or notes issued by the bank. The main question was on the constitutionality of the statute of limitations reducing the time for bringing suit, but it was also held that not only this liability, but the equitable liability for unpaid subscriptions to stock arose when the bank stopped payment, and the statute began to run from that time, though it antedated by nearly a year and a half the assignment by the bank for the benefit of its creditors."

See, also, *West v. Bank, supra.*

The final contention of the appellant is that his right of action did not accrue until notice of the fact that there were unpaid stock subscriptions was brought home to him or his assignor. His assignor was a creditor of the corporation, and as such had access to its books, and the law afforded him ample opportunity to ascertain who were stockholders and what amount of the stock subscribed remained unpaid. Bal. Code, § 4269. Mere ignorance on the part of a plaintiff with respect to his rights, where there is no fraud or conceal-

ment, does not suspend the operation of the statute of limitations. 19 Am. & Eng. Ency. Law (2d ed.), 213, 214.

We will add in conclusion that the statute of limitations commenced to run in favor of the respondents as early as April 1, 1894, under the facts disclosed by this record, and that the bar of the statute is a complete defense to the action. The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5990. Decided February 24, 1906.]

JAMES SHEEHAN & COMPANY, *Respondent*, v. MAISON BARBERIS, *Appellant*.[1]

NEGLIGENCE—OF COTENANTS IN BUILDING—FLOWAGE OF WATER—EVIDENCE—SUFFICIENCY. There is sufficient evidence that leakage or seepage causing damage to a defendant on the ground floor of a building was due to the negligence of the occupant of the second story used for the purpose of a restaurant, and was not merely accidental, where there was evidence that water would come down several times a week and sometimes every day for a week or so, and officers of the defendant admitted that many complaints were made continually for two years and that they had the plumber up to fix the pipes, and that something was wrong all the time.

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 17, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained by a tenant through the seepage of water. Affirmed.

McCafferty & Bell, for appellant, contended, *inter alia*, that to make the tenant of an upper floor liable for damages from leakage of water pipes it is necessary to allege and prove negligence. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *Steinweg v. Biel*, 16 Misc. Rep. 47, 37 N. Y. Supp. 678;

[1]Reported in 84 Pac. 607.

Terry v. Mayor, 8 Bosworth 504; *Sutton v. Card,* Weekly Notes 120 (Eng.); *Lane v. Scagle,* 67 Vt. 256, 31 Atl. 289; 3 Farnham, Waters, § 988. The lease had never been assigned to the appellant and consequently it was bound by none of the covenants. 18 Am. & Eng. Ency. Law (2d ed.), 671, 682; *Shannon v. Grindstaff,* 11 Wash. 536, 40 Pac. 123; *Tichborn v. Wier,* 67 Law Times (N. S.) 735; *Goddard v. Keate,* 1 Vern 87; *St. Joseph etc. R. Co. v. St. Louis etc. R. Co.,* 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *Haley v. Boston Belting Co.,* 140 Mass. 73, 2 N. E. 785; *Brewer v. Dyer,* 7 Cush. 337.

John Arthur and *John Frances McLean,* for respondent, contended, among other things, that the turning over of the lease to the corporation upon organization constituted it the lessee. *Wallace v. Scoggins,* 18 Ore. 502, 21 Pac. 558, 17 Am. St. 749; *Chicago Attachment Co. v. Davis Sewing Machine Co.* (Ill.), 25 N. E. 669; *Riker v. Curtis,* 17 Misc. Rep. 134, 39 N. Y. Supp. 340. It is the occupier who is *prima facie* liable to third persons. *Deford v. The State, use of Keyser,* 30 Md. 179, 205; *Murray v. McShane,* 52 Md. 217, 36 Am. Rep. 367; *De Tarr v. Ferd. Heim Brewing Co.,* 62 Kan. 188, 61 Pac. 689; *Clancy v. Byrne,* 56 N. Y. 129, 15 Am. Rep. 391, 394 and note; *Kirby v. Boylston Market Association,* 14 Gray 249, 74 Am. Dec. 682; *Leonard v. Storer,* 115 Mass. 86, 15 Am. Rep. 76; 18 Am. & Eng. Ency. Law (1st ed.), 246. If the owner lets the premsies with the nuisance upon it, and the tenant allows it to remain, they are jointly and severally liable for injuries occasioned thereby. *Buesching v. St. Louis Gaslight Co.,* 73 Mo. 219, 39 Am. Rep. 503; Shearman & Redfield, Negligence, § 365; *Kalis v. Shattuck* 69 Cal. 593, 11 Pac. 346, 58 Am. Rep. 568. The landlord is under no obligation to make repairs in the absence of express contract. *Turner v. Townsend,* 42 Neb. 376, 60 N. W. 587; *Kahn v. Love,* 3 Ore. 206; 12 Am. & Eng. Ency. Law (1st ed.), 721, and cases cited.

A tenant of an upper story is liable to a tenant of a lower story for damage caused. *Killion v. Power,* 51 Pa. St. 429, 91 Am. Dec. 127; *Simonton v. Loring,* 68 Me. 164, 28 Am. Rep. 29, 32, note; *Shindelbeck v. Moon,* 32 Ohio St. 264, 30 Am. Rep. 584.

ROOT, J.—Appellant and respondent occupied portions of the same building, in the city of Seattle. The premises occupied by respondent were on the ground floor, and were used as a saloon, while those occupied by appellant were in the second story of said building immediately above those occupied by respondent, and were used as a restaurant. One Jack Barberis, who was the principal stockholder of appellant, obtained a lease on the entire building for a term of years. Before the matters complained of herein by respondent, said Jack Barberis and certain other parties formed the appellant corporation, the said Barberis putting into said corporation, as payment for his portion of the stock, all of the property he then owned in connection with said restaurant, including the lease aforesaid, the latter, however, not being formally assigned in writing. For a year or more, respondent claims that appellant negligently permitted water to seep through the ceiling and run down into that portion of the building occupied as a saloon, greatly to the damage of respondent's property and business. This action was brought to recover damages therefor. From a judgment in favor of respondent, this appeal is taken.

Appellant maintains that the evidence does not show that the leakage and seepage was due to any negligence on the part of the appellant, and that there is nothing to show that it was other than accidental. One of respondent's witnesses testified as follows:

"Sometimes the water would come down three or four times a week—sometimes twice a week. Once, there, it came down every day for a week or so; then it continuously kept coming down—sometimes in the back part of the room, and

sometimes in front of the bar. So there was times that I couldn't go up to tell Mr. Barberis, and I sent somebody up. . . . It started, I believe, in January, 1903, and continued until 1904; then Mr. Sheehan had the place remodeled, and a new ceiling put in, and everything."

One of the former stockholders and officers of appellant testified as follows:

"Q. These complaints kept coming right along to you? A. Well, they came right along two years—I don't remember—every two or three days or week or two weeks they telephone, would be coming up, because he says the water is running down. Of course, always I can say it is by accident that that water goes down, you see, because we had the plumber over it, to fix it. There was something wrong all the time. The water goes down, you see."

There was considerable other evidence going to the fact and extent of said leakage, seepage and the damage occassioned to respondent thereby. This evidence was amply sufficient to justify the jury in believing that there must have been carelessness or neglect on the part of appellant, and to sustain the verdict. There was sufficient evidence to show that all property rights and interests in and by virtue of the lease which Jack Barberis had received were turned over to appellant corporation. The latter paid the rent, and usually with the checks of the corporation.

Finding no reversible error in the record, it is ordered that the judgment of the trial court be affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, and CROW, JJ., concur.

[No. 5850. Decided February 26, 1906.]

E. B. McCowan, *Respondent*, v. Northeastern Siberian Company, Limited, *Appellant*.[1]

Trial—Nonsuit. If there is any sufficient evidence to sustain a verdict for the plaintiff, a nonsuit should be denied.

Contracts—Employment—Amount of Salary—Evidence—Sufficiency. Upon an issue as to the amount of plaintiff's salary under a contract of employment, a clear and positive statement by the plaintiff that the same was to be a certain sum for five months and at the same rate if longer engaged, supported by a general statement as to the nature of his duties and responsibilities, amounts to substantial evidence requiring the denial of a motion for nonsuit, although his statements are positively denied by two witnesses.

Same—Evidence—Admissibility—Extent of Business. Upon an issue as to the amount of salary agreed upon in a special contract, evidence as to the character of the business of the employer and the extent of its business is relevant and admissible to show the probability of the contract.

Same—Capital Stock of Corporation. Upon an issue as to the making of a contract of employment with a corporation, the receipt of evidence of the amount of the capital stock of the defendant, brought out on the cross-examination of a witness in showing the interest of the witness in the controversy as a stockholder, is not prejudicial error.

Trial—Instructions as to Weight of Evidence. Where, upon the material point in issue, a witness on one side is contradicted by two witnesses on the other side, it is proper for the court to instruct the jury that the preponderance of the evidence is not necessarily determined by the greater number of witnesses; and it was error to instruct that the weight of the evidence was with the greater number of witnesses and that the testimony of two unimpeached witnesses cannot be disregarded.

Appeal from a judgment of the superior court for King county, Morris J., entered April 28, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a contract of employment. Affirmed.

John P. Hartman, for appellant.

Kirkpatrick & Price, for respondent.

1Reported in 84 Pac. 614.

FULLERTON, J.—The respondent brought this action against the appellant to recover a balance, claimed by him to be due for services rendered the appellant. In his complaint he alleged that he was employed by the appellant to act as its confidential agent, attorney in fact, and manager, in connection with its business in Japan, Siberia, and elsewhere, and that his services began on April 23, 1903, and ended on April 7, 1904; that, by the terms of his contract of employment, the appellant agreed to pay him the sum of $2,500 for a period of five months, and five hundred dollars a month thereafter so long as he should remain in its employ. He then alleged that he was entitled to receive for his services the sum of $5,733; that he had received $4,947; which left a balance due him of $785, in which amount he demanded judgment.

For answer the appellant admitted that it had employed the respondent to render services for it, as alleged in the complaint, but averred that it had agreed to pay him therefor the sum of $2,500, and no more; that there had come into the possession of the respondent, during the course of his employment, large sums of money, and that he had retained thereof $4,947, which was $2,477 in excess of the amount due him under his contract, and it demanded judgment against him for that sum. On the issues thus made, a trial was had before the court and a jury, which resulted in a verdict and judgment in favor of the respondent for the amount claimed by him. This appeal is from that judgment.

It is first assigned that the court erred in refusing to grant the appellant's motion for a nonsuit, on the ground that the evidence introduced on behalf of the respondent was insufficient to sustain a verdict in his favor. In his argument in support of the contention, the appellant's counsel quotes from the decisions of the Supreme Court of the United States, and from those of this state following that court, the rule to the effect that the question before the court

is not whether there is literally no evidence on the question at issue, but whether there is any upon which the jury can properly proceed to find a verdict for the party producing it—the party on whom the burden of proof is imposed; and he argues further that, while in this case there may be a scintilla of evidence in favor of the respondent, there is no substantial evidence sustaining his side of the controversy, and hence no sufficient evidence to sustain the verdict. The rule of law here announced by the appellant must be conceded. Unquestionably, if it be true that there was no more than a scintilla of evidence in favor of the respondent, or—to state the rule in another form—no substantial evidence in his favor, then the judgment must be set aside. The question therefore is, was there any substantial evidence on which the judgment can be sustained?

On the immediate question of the amount of compensation the respondent was to receive, there was no direct testimony save his own, given while testifying on his own behalf, and that of the appellant's witnesses testifying in contradiction. The respondent, after testifying that the contract of employment was made between himself and one John Rosene, the resident director and manager of the appellant, acting on its behalf, and of the negotiations leading up to his employment, continued as follows:

"A day or two before we sailed, Mr. Rosene said, 'Now about your salary.' He said, 'It might happen that you would not stay over there, or we would not need you, or you would not want to stay longer than the end of the season, owing to these fishermen might get left on the coast and you will have to get back to Vladivostok about October 1st perhaps. In case you should not stay, or we would not want you to stay, your pay will be twenty-five hundred dollars for the season.' I said, 'that would not be right, because I quit more money than that, and the season would be the same as the year, and before I could get back the year will be gone;' and he said, 'Your precaution is unnecessary, anyway; we will undoubtedly want you, for

perhaps I will want you to go to St. Petersburg and meet me there. You go along and your pay will be twenty-five hundred dollars for the season of five months, and if you stay beyond that it will be at that rate, or at any rate I will do what is right by you.' "

In addition to this he testified concerning the employment he quit in order to engage with the appellant, the nature of his duties with the appellant, the responsibilities he assumed, and the character of the business in which the appellant was engaged.

It seems to us that there was here something more than a scintilla of evidence supporting the respondent. In the above quotation, he testifies clearly and positively that he was to have $2,500 for the season of five months, and salary at the same rate if he was engaged longer, and his general statement as to the nature of his duties and responsibilities supports, rather than weakens, the force of his testimony. Therefore, notwithstanding his statements were positively denied by the two witnesses on behalf of the appellant, we think it was a question for the jury to say whether his statement or the statement of the appellant's witnesses contained the truth, and that we cannot rightly interfere with their finding.

The second assignment is that the court erred in admitting testimony concerning the character of the business the appellant was engaged in, the extent of its operation, and the amount of its capital stock. To show the character of the appellant's business, the extent of its operations, and the respondent's connection with this business while in its employ, was admissible and material on the question of the truth or falsity of his statements concerning the salary he was to receive. It is held by this court, in common with many other courts, that, in controversies where a special agreement is alleged on one side and denied on the other, it is relevant to put in evidence any circumstances which tend to make the question at issue more or less probable; this,

not to change the contract, but as evidence of what it was. *Wheeler v. Buck & Co.*, 23 Wash. 679, 63 Pac. 566; *Dimmick v. Collins*, 24 Wash. 78, 63 Pac. 1101.

The amount of the appellant's capital stock was not material for this purpose, but this was brought out on the cross-examination of Mr. Rosene while he was being questioned as to his interests in the controversy, and was admissible as showing the interest of the witness in the controversy. But had it been wholly immaterial, it could in no way have prejudiced the appellant's case. The jury must be credited with at least a *modicum* of intelligence, and it is idle to say that they might have found for the appellant on the question before them here had it not been shown that the appellant's capital stock was much or little.

The court instructed the jury to the effect that in determining the preponderance of the evidence they might take into consideration the demeanor of the witnesses while on the witness stand, their candor or lack of candor, their bias, prejudice, or interest in the result if any, and their means of knowledge concerning the matters of which they testified; instructing them further in this connection that the preponderance of the evidence was not necessarily determined by the greater number of witnesses, but that they were to make up their verdict from the whole of the evidence, giving weight to that part of the evidence the "veracity of which they had the most confidence in." It is contended that this instruction, while correct as a general principle, was misleading and prejudicial in this instance, because of the somewhat peculiar circumstances of the case. It is argued that inasmuch as there were two witnesses on the part of the appellant, while the respondent was alone as to the material part of the contract, it was the duty of the court to instruct the jury "that generally speaking, and other things being equal, the weight of the evidence was with the greater number of witnesses, and that the testimony of two unimpeached witnesses could not be disregarded." But mani-

festly the rule is in accord with the instruction given by the court, and not with the contention of the appellant. While it may be proper in certain cases to tell the jury that, other things being equal, the weight of the evidence is likely to be found with the greater number of witnesses, it would be grossly improper to tell them that they could not disregard the testimony of two unimpeached witnesses, or that they could not find in favor of that party on whose side only one witness testified because two unimpeached witnesses testified the other way. To give such an instruction would be to usurp the province of the jury. Where there is a substantial conflict in the evidence, the question on which side it preponderates is always for the jury.

There being no error in the record the judgment will stand affirmed.

MOUNT, C. J., HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5943. Decided February 26, 1906.]

IREDELL S. STONE *et al., Appellants,* v. H. L. MOODY *et al., Respondents.*[1]

VENDOR AND PURCHASER—FRAUD—RESCISSION BY VENDORS—EVIDENCE OF FRAUD—SUFFICIENCY. The plaintiffs, people of average business ability, agreed to sell to the defendant, a total stranger to them, who dissuaded them from consulting an attorney, 3,840 acres of land for the sum of $25,000 upon a small cash payment to begin with, and $2,500 annually thereafter. The contract was upon a printed form and contained a provision authorizing the defendant to sell any portion of the property, not less than one-half section at a time, making contracts direct, which the plaintiffs agreed to accept as cash payments on the contract of sale. The plaintiffs testified that they refused to agree to any such proposition, and did not know that it was contained in the contract, the defendant having conceded their demands. The contract was drawn up by the defendant and read over to the plaintiffs by him, omitting the said clause,

[1]Reported in 84 Pac. 617.

which was part of the printed matter. Subsequently the defendant made a contract of sale of 2,500 acres for $22,500, and demanded that it be accepted as cash. This the plaintiffs at first refused to do, but later, after protests and upon representations by the defendant that it would not in any way release him from making payments as long as they held title to the lands, the plaintiffs indorsed upon the contract a receipt for $22,500, releasing the balance of the land therefrom. *Held*, that the plaintiffs had been overreached by the fraudulent practices of the defendant and a judgment of nonsuit should be reversed and a new trial ordered.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 27, 1905, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing on the merits an action to rescind a contract for the sale of land. Reversed.

T. P. & C. C. Gose, for appellants.

W. H. Winfree and *F. L. Taylor,* for respondents.

Root, J.—Appellants owned about three thousand eight hundred and forty acres of land, in Klickitat county, upon which they lived. Respondent H. L. Moody, who up to the time in question had been unknown to the appellants, called upon them with reference to making a purchase of said land. After examining the land, and spending two or three days with them, a written contract was entered into, wherein and whereby Moody agreed to pay appellants $25,000 for the land, and in lieu of interest, agreed to pay $600 additional. The terms of the payment were as follows: $100 cash, $400 February 1904, $1,000 March 10, 1904, $600 February 1, 1905, and $2,500 on the 1st day of each and every February thereafter until paid, with permission to pay the whole at any time. The contract provided that Moody should have the right to sell any part of the property, not less than one-half section at a time, whenever he desired; and it was further provided that appellants should not take any deficiency judgment, nor require any insurance, and that they would allow second party to assign

the agreement if he desired. The written contract also contained the following:

"He [Moody] may draw the contract direct from the first parties hereto to such purchasers, or from himself, and the first parties agree to accept such contracts as cash payments on this contract, when either drawn to themselves or properly assigned to them, without recourse, by the second party hereto, or his assigns."

The foregoing contract was entered into on the 1st of February, 1904. Moody paid, at the time of entering into the contract, $100, and on February 9 made a further payment of $400. On the 26th of February, 1904, Moody sold to one Fred W. Heller two thousand five hundred and sixty acres of said land, upon a contract wherein and whereby said Heller agreed to pay $22,500. Thereafter said Moody presented said Heller contract to appellants, and demanded that they give him credit for $22,500 upon his contract with them, and after considerable controversy over the matter, appellants signed upon the back of the contract the following indorsement and receipt:

"February 27, 1904.

"Received $22,500 on the payments mentioned within, to be paid after February 1st, 1905, leaving $2,500 now unpaid, sections 33, 29, 9, the south half of the northeast quarter, the south half of the northwest quarter, and the south half of section 21—within mentioned, are hereby released from this agreement;"

which receipt was signed by all of appellants. On the 9th of March, 1904, respondents paid to appellants the further sum of $1,000 on account of the purchase price. On the 9th day of April, 1904, respondents tendered appellants the further sum of $1,600, on account of said contract, and as full and complete payment of the purchase price, and demanded of appellants a good and sufficient deed to all of the remaining lands. Appellants refused to accept said money or to make said deed. They soon after instituted this action to set aside the contract made with respondent Moody.

They claim that said Moody was guilty of fraud, misrepresentation, and overreaching, and that they signed the contract and the receipt hereinbefore mentioned under a mistake and misapprehension as to the contents and effect of the contract, and as to the significance and effect of the receipt. They claim that, when Moody was negotiating with them for the purchase of the property, they expressed a desire to consult an attorney and obtain legal advice, but that he dissuaded them by representing that he was a man thoroughly familiar with such transactions, accustomed to drawing contracts of sale, and that he was an honest and upright Christian man, and would protect their interests fully in every respect; that he was in a hurry to get away, and delay would occasion him great inconvenience, and that there was no need of the delay or expense attendant upon going to town to consult attorneys; that he manifested every appearance of being fair, upright, and honorable, and won their confidence and trust.

Appellants strenuously contend that the clause of the contract hereinbefore quoted, which refers to the acceptance of contracts as cash, was put into the contract without their knowledge and consent, and against their wishes, and that they did not know of its presence in the contract until long after its execution. In preparing the contract, a printed blank was used, covering the usual and ordinary conditions found in contracts for the sale of land, and containing spaces wherein could be written any special matters of agreement between the parties. In discussing these latter, Moody suggested the proposition of his being permitted to sell portions of the land, and to turn the contracts thus received over to appellants as cash. Appellants say, that they emphatically refused to accede to this proposition, and that Moody said that he would, therefore, not place the same in the contract; that they signed the contract without reading the same, having heard Moody read it.

After the latter had made the contract of sale with and

to Heller, and presented the contract to appellants, and demanded from them an acceptance of the same as cash, and a receipt showing that it was so accepted, appellants at first declined and refused to comply with these demands, and one or two stormy interviews took place between them. They claim, however, that Moody represented to them that the receipt did not mean what they thought it did, and that by signing it they would not release the property from the effect of their contract, and that it would not in any way release him from making complete payment, or in any way release the property from the lien which they would have, inasmuch as the title still remained in their name, and that he would see that they were in no manner imposed upon, but should have and receive the money for which they had agreed to sell the property; and that, being misled by his statements, suavity, and misrepresentations, they signed said receipt. They claim that they did not understand the purport or significance of said contract or of said receipt in any different way from that in which he orally explained and interpreted it to them, until Moody tendered them the $1,600 and demanded a deed for the balance of the property. The claims made by appellants, as hereinbefore set forth, are substantiated by the evidence they adduced at the trial.

The lower court rendered judgment in favor of respondents, upon their motion for nonsuit at the close of appellants' case; having, however, after the making of the motion, permitted the respondents to introduce evidence as to the value and present ownership of the property, and as to tender of payment and refusal. The court found that appellants were people of, or above, average intelligence, and found that Moody was an utter stranger to them prior to the commencement of the negotiations with regard to the purchase of the land; that they knew, or had opportunity to know, of all that was in the contract, and of all that was in the receipt, and that there was no fraud or misrepresentation or overreaching, and that appellants were not in a position to be

heard to say that they did not know what they were signing.

We reach a different conclusion from that of the trial court, but are able to do so, we admit, with considerable difficulty. Ordinarily, when people of average intelligence sign instruments which they have an opportunity to read, but do not, they should not be afterwards permitted to say that they did not know what they were signing. If this contract did not contain a provision which we deem to be absolutely unconscionable, and one which no intelligent vendor would knowingly have subscribed to, we would not be disposed to listen to any claim on the part of these appellants that they did not know of the contents of this contract. Why intelligent people, unfamiliar with business matters and the forms, terms, and requisites of written contracts, should enter into one of this magnitude without legal advice, and do so relying solely upon the representations of the opposite party to said contract, is hard to understand; and why these appellants should have signed the receipt hereinbefore mentioned is still more difficult of comprehension. These things evidence a stupidity most pronounced.

When we turn to the other party to the contract, however, we see evidences of something worse than stupidity. The provision in this contract which permitted Moody to sell any portion of this land (not less than three hundred and twenty acres at a time) upon a contract for any amount which he might choose above a certain price, and to have the privilege of turning over such a contract as cash to appellants, afforded an opportunity for the rankest kind of fraud. To perpetrate the fraud, all that would be necessary would be to make out a contract, in form, to a "straw" man, or to an absolutely irresponsible person, for a small portion of the property, and then receive for this valueless thing a credit upon his contract with appellants for whatever amount might be mentioned as the consideration in the sham contract.

Eliminating from the case the evidence of appellants that

they did not know that this clause was in the contract, we think the presence of such a clause, without some clear and strong reason in behalf of appellants for its being there, would of itself be sufficient to overcome the claim of Moody that appellants knew of its presence in the contract. In cases of this character, to set aside a written instrument where the issue is as to whether the parties knew of certain things being in the contract, the question is usually one of veracity between the respective parties; and where it is evident that the parties sought to be charged might have known, by the exercise of their natural faculties, of what the instrument contained, the law will not permit them to say that they did not know, but lets the instrument speak for itself and be controlling. But where such an extraordinary provision as we have here is found in a contract—one which, as a matter of law, renders the contract obnoxious to every sense of fairness, honesty and right, and is such as to make its enforcement clearly unconscionable—the court is justified in believing that the parties sought to be charged did not know of the presence of such provision, or did not have any comprehension of its significance.

Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their

practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery, or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed from the standpoint of public policy. It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a court of equity may with propriety interpose.

The judgment of the lower court is reversed, and the cause is remanded with instructions to grant the relief prayed for in appellants' complaint.

MOUNT, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

ON PETITION FOR REHEARING.[1]

[Decided May 25, 1906.]

PER CURIAM.—After additional written argument and further consideration, we have reached the conclusion that this case should be, and it is hereby, remanded for a new trial. Either party may have the privilege of using the evidence before the court on the former trial in so far as the same is available and desired, and may introduce such further evidence as seems advisable.

[1]Reported in 85 Pac. 346.

[No. 5962. Decided February 26, 1906.]

DAVID BROWN, *Respondent*, v. OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

NEGLIGENCE — FAILURE TO PLEAD CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. In an action to recover the value of a barn, destroyed by a fire negligently set out upon a railroad right of way, it is proper to submit to the jury an issue, raised by the evidence of the plaintiff, as to the contributory negligence of the plaintiff in not protecting his property, although contributory negligence was not pleaded as a defense to the action.

FIRES—ON RAILROAD RIGHT OF WAY—CONTRIBUTORY NEGLIGENCE. In an action to recover the value of a barn destroyed by a fire set out on a railroad right of way, on the opposite side of a river about 150 to 200 feet wide, evidence on the part of the plaintiff that he had known of the fire raging on the right of way for a day or two, and particularly on the morning in question, and that he left a wide door open on that side of the barn, warrants an instruction to the jury as to the plaintiff's negligence to the effect that the defendant was not liable if the plaintiff failed to use ordinary care to protect his property; and an order granting a new trial solely on the ground of error in such instruction will be reversed.

Appeal from an order of the superior court for Spokane county, Huneke, J., entered May 27, 1905, granting a new trial for error in instructions, after the verdict of a jury in favor of the defendant, in an action for damages from a fire set out on the defendant's right of way. Reversed.

W. W. Cotton, Arthur C. Spencer and *Samuel R. Stern*, for appellant, contended that the burden was upon the respondent to show that the fire originated from appellant's right of way. *Sheldon v. Hudson River R. Co.*, 29 Barb. 226; *Finkelston v. Chicago etc. R. Co.*, 94 Wis. 270, 68 N. W. 1005; *Flanaghan v. Chicago etc. R. Co.*, 65 Minn. 112, 67 N. W. 794; *Stratton v. Union Pac. R. Co.*, 7 Colo. App. 126, 42 Pac. 602; *Denver etc. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. 664; *Denver etc. R. Co. v. Morton*,

[1]Reported in 84 Pac. 400.

3 Colo. App. 155, 32 Pac. 345; *Edrington v. Louisville etc. R. Co.*, 41 La. Ann. 96, 6 South. 19. If it appears equally probable that the fire originated from any other cause than the fire on appellant's right of way, respondent is not entitled to recover. *Brown v. Atlanta etc. R. Co.*, 19 S. C. 39. Appellant had a lawful right to burn all combustible material on its right of way. *Pittsburg etc. R. Co. v. Culver*, 60 Ind. 469; *Atchison etc. R. Co. v. Dennis*, 38 Kan. 424, 17 Pac. 153. The burden was upon respondent to show negligence in the setting out and management of the fire, and the destruction of the property by fire does not raise a presumption of negligence. *Catron v. Nichols*, 81 Mo. 80, 51 Am. Rep. 222; *Meyer v. Vicksburg etc. R. Co.*, 41 La. Ann. 639, 6 South. 218; *Indianapolis etc. R. Co. v. Paramore*, 31 Ind. 143; *Ruffner v. Cincinnati etc. R. Co.*, 34 Ohio St. 96; *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308; *Jacksonville etc. R. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1, 9 South. 661; *Smith v. Hannibal etc. R. Co.*, 37 Mo. 287; *Bachelder v. Heagan*, 18 Me. 32; *Case v. Hobart*, 25 Wis. 654. Appellant would not be liable for damages which the exercise of ordinary care on the part of the plaintiff might have prevented, and the evidence introduced by respondent was such as to require the court to submit to the jury the question whether respondent exercised the care that a man of ordinary prudence would have exercised under the circumstances. *Austin v. Chicago etc. R. Co.*, 93 Wis. 496, 67 N. W. 1129; *Talley v. Courter*, 93 Mich. 472, 53 N. W. 621; *Illinois etc. R. Co. v. McKay*, 69 Miss. 139, 12 South. 447; *Waters v. Brown*, 44 Mo. 302; *Tilley v. St. Louis etc. R. Co.* 49 Ark. 535, 6 S. W. 8; *Kellogg v. Chicago etc. R. Co.*, 26 Wis. 257; *Doggett v. Richmond etc. R. Co.*, 78 N. C. 305; *Illinois etc. R. Co. v. McClelland*, 42 Ill. 355; *Toledo etc. R. Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Eaton v. Oregon R. & Nav. Co.*, 19 Ore. 391, 24 Pac. 415; *Richmond v. McNeill*, 31 Ore. 342, 49 Pac. 879. It was proper to submit to the jury

the question whether or not the respondent exercised ordinary care in protecting his own property, even though no plea of contributory negligence had been set up by the appellant in its answer. *Hoyt v. Hudson,* 41 Wis. 105, 22 Am. Rep. 714; *Baltimore etc. R. Co. v. Whitacre,* 35 Ohio St. 627; *Evans etc. Brick Co. v. St. Louis etc. R. Co.* 21 Mo. App. 648; *Platte etc. M. Co. v. Dowell,* 17 Colo. 376; Wharton, Negligence, § 423; *Denver v. Dunsmore,* 7 Colo. 328; *Denver etc. R. Co. v. Ryan,* 17 Colo. 98; *Railroad Co. v. Gladmon,* 15 Wall. 401, 21 L. Ed. 114; *Dallas etc. R. Co. v. Spicker,* 61 Tex. 427, 48 Am. Rep. 297; *Gerity v. Haley,* 29 W. Va. 98, 11 S. E. 901; *Pennsylvania Canal Co. v. Bentley,* 66 Pa. St. 30; *Cleveland etc. R. Co. v. Rowan,* 66 Pa. St. 393; *Hudson v. Wabash etc. R. Co.,* 101 Mo. 13, 14 S. W. 15; *McMurtry v. Louisville etc. R. Co.,* 67 Miss. 601, 7 South. 401; *Waterman v. Chicago etc. R. Co.,* 82 Wis. 613, 52 N. W. 247, 1136; *Robinson v. Western Pac. R. Co.,* 48 Cal. 409; *Bowers v. Union Pac. R. Co.,* 4 Utah 215, 7 Pac. 251; *Daly v. Hinz,* 113 Cal. 366, 45 Pac. 693; *Linden v. Anchor Min.* Co., 20 Utah 134, 58 Pac. 355; *Bunnell v. Rio Grande etc. R. Co.,* 13 Utah 314, 44 Pac. 927; *Clark v. Oregon Short Line R. Co.,* 20 Utah 401, 59 Pac. 92.

W. C. Jones, for respondent, contended, *inter alia,* that the plaintiff was not bound to anticipate the negligence of the defendant, and was not guilty of contributory negligence. *Snyder v. Pittsburg etc. R. Co.,* 11 W. Va. 14; *Tien v. Louisville etc. R. Co.,* 15 Ind. App. 304; *Tacoma Lum. etc. Co. v. Tacoma,* 1 Wash. 12, 23 Pac. 929; *Spurrier v. Front St. Cable R. Co.,* 3 Wash. 659, 29 Pac. 346; *McCoy v. California etc. R. Co.,* 40 Cal. 532, 6 Am. Rep. 623. Contributory negligence could not be proven when not pleaded. *Hudson v. Wabash etc. R. Co.,* 101 Mo. 13, 14 S. W. 15; *Bunnell v. Rio Grande etc. R. Co.,* 13 Utah 314, 44 Pac. 927; *McQuilken v. Central Pac. R. Co.,* 50 Cal. 7.

DUNBAR, J.—This is an action to recover for damages, alleged to have been occasioned to respondent's property by a fire claimed to have been set on the right of way of the appellant, opposite to the barn of respondent, in Kootenai county, Idaho. The right of way was on one side of the Coeur d'Alene river and the barn on the other, the barn being a few feet from the banks of the river, and the right of way close to the banks of the river; the river being, as we are able to gather from the testimony, from one hundred and fifty to two hundred feet wide. The complaint alleged the negligence of the defendant in burning its right of way without taking care of the fire, and the damage to the plaintiff by reason of the barn being burned by sparks blowing from the fire to the barn. Upon the trial of the cause, verdict was rendered for the defendant. At least, we presume such a verdict was rendered. It does not appear in the record, but both appellant and respondent having argued the case on that theory, we have assumed that the verdict was as is alleged. A motion for retrial was granted, upon the ground, as stated by the court, of error in instructing in relation to the negligence of the respondent, and upon no other ground. This appears by a supplemental statement incorporated in the record. The instruction was as follows:

"I instruct you further that, if the plaintiff knew of the existence of the fire on the land opposite the barn adjoining along the right of way before the same was communicated to his barn, and if in the exercise of ordinary care he had reason to believe that there was danger of its being communicated to his barn, then it is his duty to use ordinary care to prevent the fire from being communicated to his barn; that it is his duty to either put the fire out himself or to communicate with the defendant or its employes, if he could. It was in the way of ordinary care, and if he failed to use ordinary care for the protection of his own property against destruction by fire, then the plaintiff cannot recover."

It is contended by the respondent that there is no question of contributory negligence in this case, and that there was no duty devolving upon the respondent in the premises, and that, therefore, the instruction had no proper place in the case, and should not have been given. The appellant cites cases from a great many different jurisdictions to the effect that, notwithstanding the fact that in jurisdictions where contributory negligence is an affirmative defense, as in this state, it is proper to submit to the jury the question whether or not the respondent exercised ordinary care in protecting his own property, even though no plea of contributory negligence has been set up by the defendant in its answer. These authorities, it is claimed by the respondent, are not in point. But we are forced to the conclusion that they are directly in point—a great many of them; and without reviewing them generally, that the rule is as stated in *Bunnell v. Rio Grande etc. R. Co.*, 13 Utah 314, 44 Pac. 927, where the court says:

"Generally, contributory negligence is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence."

And it is the general rule that the want of a plea of contributory negligence will not preclude the trial court from awarding nonsuit, when the evidence introduced by the plaintiff establishes a defense so conclusive in this respect that the court will grant a new trial in case of a verdict in his favor upon like evidence.

If this be true, then we see no inconsistency in the court submitting to the jury questions of fact which, if established as facts, would preclude the plaintiff from recovering. This was all that was done in this case. There was testi-

mony on the part of the plaintiff to the effect that he had known for a day or two of this fire raging on the right of way opposite his barn; especially knew of it that morning; and that he had left open a door fourteen feet wide which looked toward the fire; and, while the court in this case did not go so far as to say that these would be such acts and omissions on the part of the plaintiff as would prevent him from recovering, it left it to the jury to determine whether such acts in their judgment showed the lack of the exercise of ordinary care.

We are unable to discover any error in the instruction, and the judgment will, therefore, be reversed, with instructions to the trial court to deny the motion for a new trial, and enter judgment on the verdict.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 6006. Decided February 26, 1906.]

C. O. PETERSON, *Appellant*, v. R. A. WELLS *et al.*, *Respondents*.[1]

MALPRACTICE—NEGLIGENCE IN SETTING BROKEN LEG—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for malpractice in setting a broken leg a *prima facie* case of want of skill and diligence is shown, and it is error to grant a nonsuit, where it appears from the testimony of the plaintiff that when the plaster cast was removed, after four weeks, the leg was found to be crooked and the plaintiff was very lame, walking on the side of the foot, that he went to a hospital and the leg was rebroken and reset, after which his condition was very much improved, and where an expert testified to the effect that if the leg was crooked when the case was removed it indicated something more than "a bad result" and that it had not been treated with ordinary skill.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered July 10, 1905, in favor of the de-

[1]Reported in 84 Pac. 608.

fendants, upon granting a nonsuit at the close of plaintiff's case, in an action to recover damages for malpractice. Reversed.

Robertson, Miller & Rosenhaupt, and *J. A. Rochford,* for appellant.

Kellogg & Neal, for respondents, contended, that, if ordinary diligence and skill is brought to the treatment of an injury, the physician is not responsible for unfavorable results. *Sawdey v. Spokane Falls etc. R. Co.,* 30 Wash. 349, 70 Pac. 972; *Ewing v. Goode,* 78 Fed. 442; *Jackson v. Burnham* 20 Colo. 532; *Sims v. Parker,* 41 Ill. App. 284; *Jones v. Angell,* 95 Ind. 376; *Patten v. Wiggin,* 51 Me. 594, 81 Am. Dec. 593; *Martin v. Courtney,* 75 Minn. 255; *Williams v. Poppleton,* 3 Ore. 139; *Grindle v. Rush,* 7 Ohio, pt. 2, 123; *McDonald v. Harris,* 131 Ala. 359, 31 South. 548; *Force v. Gregory,* 63 Conn. 167, 38 Am. St. 371; *Akridge v. Noble* 114 Ga. 949, 41 S. E. 78; *Utley v. Burns,* 70 Ill. 162; *Kendall v. Brown,* 74 Ill. 232; *Leighton v. Sargent,* 27 N. H. 460, 57 Am. Dec. 388. The mere fact that no cure was effected does not create a liability nor raise a presumption of want of proper care or skill. *Tefft v. Wilcox,* 6 Kan. 46; *Haire v. Reese,* 7 Phila. 138; *Alder v. Buckley,* 1 Swan 69. The law accords the medical practitioner the presumption that he has done his duty, and the burden is on the plaintiff to prove want of reasonable care or skill, and also that the injury complained of resulted from such want of care or skill. *State v. Housekeeper,* 70 Md. 162, 14 Am. St. 340, 2 L. R. A. 587; *Styles v. Tyler,* 64 Conn. 432, 30 Atl. 165; *Georgia Northern R. Co. v. Ingram,* 114 Ga. 639, 40 S. E. 708; *Holtzman v. Hoy,* 118 Ill. 534, 59 Am. Rep. 390; *McKey v. Allen,* 96 Ill. App. 147; *Martin v. Courtney,* 87 Minn. 197, 91 N. W. 487; *Robinson v. Campbell,* 47 Iowa 625; *Scudder v. Crossan,* 43 Ind. 343; *Getchell v. Hill* 21 Minn. 464; *McCandless v. McWha,* 25 Pa. St. 95; *Vanhooser v. Berghoff,* 90 Mo. 487, 3 S. W. 72. Expert questions should be based

upon facts proved and not upon conjecture. *Steagald v. State,* 24 Tex. App. 207; *Smalley v. Appleton,* 75 Wis. 18, 43 N. W. 826; *Filer v. New York Cent. R. Co.,* 49 N. Y. 42; *Collins v. Janesville,* 99 Wis. 464, 75 N. W. 88.

RUDKIN, J.—This action was brought to recover damages for malpractice. On the 14th day of January, 1904, the plaintiff sustained a fracture of both bones of the left leg, at or near the ankle joint, while taking out limestone for the Northport Smelter. The accident occurred about eleven o'clock in the forenoon, and the plaintiff was immediately removed to the Northport hospital, conducted by the defendants, for treatment. About four o'clock in the afternoon of the same day, the defendants set the bones, and placed the leg in a plaster cast extending from the knee down over the foot. The leg remained in this cast for about four weeks, and the plaintiff remained at the hospital for about two weeks after the cast was removed. After he left the hospital he stopped at the hotel in Northport for about a week, and then went to the quarry where he had been working prior to the injury, and remained about two months.

According to the testimony of the plaintiff and his witnesses, when the plaster cast was removed the leg was crooked, curving in at the ankle, so that the plaintiff walked on the inside of the ball of the foot and heel, and was very lame. After the plaintiff left the quarry, some three or four months after the injury, he went to Spokane and consulted Dr. Newman, who was a witness in his behalf at the trial. The doctor made a somewhat cursory examination of the leg, and inasmuch as the plaintiff was without means, the doctor advised him to go to the county physician. Soon after this the plaintiff went to a hospital in Spokane, and there the bones were rebroken and reset. The condition of the leg was materially improved by this second operation. At the close of the plaintiff's case, the court granted a nonsuit, and from the judgment of nonsuit this appeal is taken.

The appellant contends that he made out a prima facie case of negligence or want of skill on the part of the respondents, and that he was entitled to have his case submitted to the jury. The respondents, on the other hand, contend that the appellant proved nothing more than a "bad result," and that this of itself is no evidence of want of care or skill in actions of this kind.

"The contract implied by law from the mere employment of a surgeon is that he will treat the injury he is employed to treat with ordinary diligence and skill. This requires that he bring to its treatment such a degree of skill and diligence as surgeons practicing in the same general neighborhood, in the same line of practice, ordinarily have and exercise in like cases." *Sawdey v. Spokane Falls etc. R. Co.*, 30 Wash. 349, 70 Pac. 972.

He does not undertake to effect a cure, or restore a broken limb to its normal condition. If he treats the injury with a reasonable degree of skill and care he is not responsible for the results. The testimony in this case as to the nature of the fractures was very general, and if nothing further was shown than the "bad result," as contended by the respondents, the judgment below was doubtless right; but we cannot agree with the respondents that nothing beyond a bad or unfavorable result was shown. It was further proved that a second operation was performed in which the bones were rebroken and reset, and that the second operation resulted in a very considerable improvement in the condition of the leg. This of itself was some evidence of negligence or want of skill in the first treatment, and would probably carry the case to the jury, without more. *Sawdey v. Spokane Falls etc. R. Co., supra.* In addition to this, however, Dr. Newman who examined the leg after the first treatment, and before the second, testified as follows:

"Q. Doctor, take the case of a simple fracture where the limb is encased in a plaster cast and when the cast is taken off the limb is crooked like you say you found this one

when you examined it, would you say that the limb had been treated with the ordinary skill usually exercised by practitioners in treating a case of that kind? A. Well, of course if it was like that when the cast came off of course I don't know, why, necessarily, it would follow that it was a bad result. Q. What would you say as to the skill exercised in treating it? A. Well it would not look good; of course it would not look like the treatment did it, but it would look like it had not been straightened in the first place when it was put up unless some accident had happened to it in the meantime to bend it. Of course in a case like that the bones would not be solid yet and it would be very easy to straighten it at that time by breaking it over. Q. Would you say that the case had received the ordinary diligence and skill that a case of that kind usually receives among the medical profession. A. Well, if the man had not been walking on the leg, or if the plaster had been solid enough to hold it there it could not have happened; if it was straight in the first place, I would not consider it a good case. Q. Take the result as you found it, and conceding that the patient had been ordinarily careful, had not walked on the limb and there were no complications, what would you say then as to whether or not it had been treated with the ordinary skill and diligence which a physician would use? A. You say assuming it was in that position when the cast came off? Q. Yes, sir. A. That is a hypothetical question? Q. Yes, sir. A. I should say no, it had not been treated with ordinary skill. Q. Is it usual to find a leg or limb crooked at the time the splints or the plaster is removed? A. No, certainly not. Q. If a limb were in a position crooked as this one was when you found it at the time the cast was taken off, what would be the probability of its straightening up after that time? A. It would get worse instead of straighter," etc.

After a searching cross-examination of the appellant, nothing was adduced tending to show that any act of his contributed in any way to the unfavorable results produced by the respondents' treatment, and we are clearly of opinion that a *prima facie* case of want of diligence or skill on the part of the respondents was made out, and that the case should have been submitted to the jury.

For the error in granting the nonsuit the judgment is reversed and a new trial ordered.

MOUNT C. J., FULLERTON, HADLEY, and CROW, JJ., concur.

[No. 5878. Decided December 16, 1905.]

JAMES A. BROADBENT, *Appellant*, v. MUKILTEO LUMBER COMPANY, *Respondent*.[1]

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered December 13, 1904, in favor of the defendant, dismissing on the merits an action for services as an architect, upon sustaining a challenge to the evidence. Affirmed.

Rossman & Johnson, for appellant.

Brownell & Coleman and *Cooley & Horan*, for respondent.

PER CURIAM.—This is an action to recover the value of services alleged to have been rendered by appellant as an architect in the building of a sawmill. At the conclusion of the testimony, the court sustained a challenge to the sufficiency of the evidence, and the cause was dismissed.

The record is voluminous, and its analysis in this opinion would be profitless. But, conceding the legal propositions urged by appellant in his favor, from an investigation of the testimony submitted by him on both direct and cross-examination, we are convinced that there was a failure of proof to sustain his claim.

The judgment will therefore be affirmed.

[No. 5730. Decided December 19, 1905.]

SETH WARREN, *Respondent*, v. CHEHALIS COUNTY, *Appellant*.[2]

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 23, 1905. Reversed.

E. E. Boner, *W. H. Abel*, and *John C. Hogan*, for appellant.

C. W. Hodgdon, for respondent.

PER CURIAM.—This cause involves the same questions discussed in *Ogden v. Chehalis County*, *ante* p. 45, 82 Pac. 1095. For the reasons there assigned, the judgment in this case is reversed and the cause remanded with instructions to dismiss the action.

[1]Reported in 82 Pac. 1135.

[2]Reported in 82 Pac. 1097.

[No. 5693. Decided December 28, 1905.]

THOMAS DOUGLAS, *Respondent*, v. LA RICA CONSOLIDATED, *Appellant*.[1]

Appeal from an order of the superior court for Chelan county, Steiner, J., entered March 3, 1905. Reversed.

Smith & Cole, for appellant.

Frank Reeves and *Reeves & Reeves*, for respondent.

PER CURIAM—The facts in this case are substantially the same as those in *Douglas v. Badger State Mine*, *ante* p. 266, 83 Pac. 178, and controlled by the same principles. Upon the authority of that case, the judgment of the trial court in this cause is reversed.

[No. 5858. Decided January 9, 1906.]

W. H. HARRIS *et al.*, *Appellants*, v. THE CITY OF TACOMA, *Respondent*.[2]

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered January 31, 1905. Reversed.

Emmett N. Parker and *W. H. Harris*, for appellants.

O. G. Ellis, *J. J. Anderson*, and *R. E. Evans*, for respondent.

PER CURIAM.—This case was submitted with the case of *Harris v. Tacoma*, 39 Wash. 185, 81 Pac. 691, under a stipulation that the same disposition should be made of it as the court should make of that case. Pursuant to the stipulation, therefore, it is ordered that the judgment appealed from be reversed, and the cause remanded with instructions to reinstate the appeal.

[No. 5503. Decided February 24, 1906.]

PLUMA M. HARRIS, *Appellant*, v. ANNIE LEVEY *et al.*, *Respondents*.[3]

Appeal from a judgment of the superior court for King county, Bell, J., entered June 20, 1904. Appeal dismissed.

E. F. Kienstra, for appellant.

George E. de Steiguer and *R. R. George*, for respondents.

ON PETITION FOR REHEARING.[4]

PER CURIAM.—In this case a petition for a rehearing, accompanied by a strong argument, was filed and a rehearing granted. After a careful reconsideration of the questions involved, a majority of the members of the court feel that no change should be made in the decision heretofore rendered. The appeal will therefore be dismissed.

[1]Reported in 83 Pac. 182.

[2]Reported in 83 Pac. 1119.

[3]Reported in 84 Pac. 607.

[4]NOTE. For former opinion, see 39 Wash. 158, 81 Pac. 550. REP.

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Through defective street or sidewalk, see MUNICIPAL CORPORATIONS, 25-35.

ACCOMMODATION PAPER:

See BILLS AND NOTES.

ACCOUNT:

Evidence of compromise, see COMPROMISE AND SETTLEMENT, 2.
Failure of administrator to render, see EXECUTORS AND ADMINISTRATORS, 3.

1. ACCOUNTING—CONTRACTS—ADVANCEMENTS—RENTS AND PROFITS OF LAND—ITEMS CHARGEABLE. Where premises were conveyed to the defendants, who undertook to redeem the same from mortgage and other liens, and to reconvey a part after full reimbursement out of the rents, issues and profits, the defendants are not entitled upon an accounting to credit for taxes paid or improvements made on their portion of the land, after they took possession, nor for the expense of foreclosing a mortgage on the premises incurred to enable them to gain possession of other lands; nor could they farm out the land to themselves at a profit and credit the former owner with only one-third of the crop, since they were entitled only to actual expenses. *Clutter v. Strange*..... 86
2. SAME—FAILURE TO KEEP ACCOUNTS. Where grantees in a conveyance of lands, agreed to reconvey a portion of the premises upon being fully reimbursed for advances out of the net rents, issues and profits of the land, they are bound to keep proper accounts, and must be held to be fully reimbursed where no accurate accounts were kept for a period of years, except such as could be prepared from disconnected data and memory, showing many discrepancies and errors. *Id*..... 86
3. ACCOUNTING—STOCK HELD AS SECURITY—VALUE AT DATE OF TRIAL. In an action to secure a return of corporate stock or its value, which had been pledged to secure a debt, and had passed into the hands of executors of the pledgee charged with the trust, the plaintiff is entitled to the value at the date of the trial. *Collins v. Denny Clay Co*..... 136
4. CHATTEL MORTGAGES—ACCOUNTING—EVIDENCE—BURDEN OF PROOF. Upon an accounting in an action to redeem a mortgage of stock held as security, the burden of proof is upon the mortgagee to show the amount of dividends received by it on the stock to be credited on the debt. *Id*..... 136

ACKNOWLEDGEMENT:

To mortgage, see MORTGAGES, 1.
Unacknowledged leases, see LANDLORD AND TENANT, 4.

ACTION:

Accrual of, see CORPORATIONS, 2, 3, 6.
Breach of contract, see CONTRACTS.
Compensation of brokers, see BROKERS, 1.
Conditions precedent, see CORPORATIONS, 2-4.
Establishment of boundaries, see BOUNDARIES, 1-4.

ACTION—CONTINUED.

Establishment and enforcement of right of homestead, see HOMESTEAD, 1, 2.
Injunction bond, see INJUNCTION, 1, 2.
Injuries from fires caused by operation of railroad, see RAILROADS, 1, 2.
On judgment against nonresidents, see LIMITATION OF ACTIONS, 4.
Limitation by statute, see LIMITATION OF ACTIONS.
Malpractice, see PHYSICIANS AND SURGEONS.
Misjoinder, finality of order, see APPEAL AND ERROR, 2.
Mortgagor and mortgagee, see CHATTEL MORTGAGES, 1; MORTGAGES, 1-6.
Nonsuit, see TRIAL, 5-7.
Notice of pendency of action, see LIS PENDENS.
For negligence as to demised premises, see LANDLORD AND TENANT, 1, 2.
Recovery of demised premises, see LANDLORD AND TENANT, 4-6.
For property of third person converted to use of estate, see EXECUTORS AND ADMINISTRATORS, 1, 2.
Recovery of insurance premiums, see INSURANCE, 10.
Remedy of warrant holders, see MUNICIPAL CORPORATIONS, 13-17.
Stock subscription, see CORPORATIONS, 2-6.
Suits in equity, see EQUITY.
By tenant to abate nuisance, see NUISANCE, 1-3.
To set aside tax sale. see TAXATION, 12.

ADEQUATE REMEDY AT LAW:

See MANDAMUS, 1; NUISANCE, 2.
Adequacy of other remedy as affecting right to prohibition, see PROHIBITION, 1.

ADJOINING LAND OWNERS:

1. ADJOINING LANDOWNERS—LATERAL SUPPORT—BLASTING—INJURY TO BUILDINGS — TUNNELING ADJACENT LAND — RECOVERY IRRESPECTIVE OF NEGLIGENCE. In an action for damages to buildings by the sinking and subsidence of the earth, caused by the construction of a railway tunnel in a city under lands adjacent to the plaintiff's buildings, recovery may be had without proof of negligence on the part of the railroad company in constructing the tunnel, when the damage was caused by the removal of the lateral support or the shaking of the earth by blasts and not by any increased downward or lateral pressure upon the soil by the buildings, in view of the constitutional provision that private property shall not be damaged without just compensation having been first made. *Farnandis v. Great Northern R. Co*..... 486

2. SAME—EVIDENCE—QUESTION FOR JURY. In an action for damages to buildings, the question whether the injury was caused by blasts and the removal of lateral support by the construction of a tunnel

ADJOINING LAND OWNERS—CONTINUED.

one hundred and twenty feet distant, is for the jury when the sinking and cracking of the earth was evidently not due to any increased or downward pressure upon the soil by the buildings. *Id.*..... 486

3. SAME — REMOVAL OF LATERAL SUPPORT — TAPPING SUBTERRANEAN WATERS—DAMAGES FROM OPERATIONS IN PUBLIC STREETS. In an action for damages to premises by the removal of lateral support, it is no defense that the subsidence of the land was due to an excavation under a public street which tapped subterranean waters the withdrawal of which caused the subsidence of the land, the same rule applying as in the case of the damaging of property by the removal of earth in a public street. *Id.*..... 486

4. SAME—MEASURE OF DAMAGES—LANDLORD AND TENANT. In an action by the lessees of buildings used for hotel and lodging purposes for damages by the removal of lateral support making the buildings unfit for occupancy, it is proper to instruct the jury to consider in determining the damages the uses to which the buildings were put. *Id.*..... 486

5. SAME—MEASURE OF DAMAGES—USE OF BUILDINGS. In an action by the lessees of buildings, by them sublet to other tenants, for damages to the buildings by reason of the removal of lateral support, the measure of damages does not include any sum for the responsibility of the plaintiffs to their tenants for want of repair, since the plaintiffs would not be liable to the subtenants without negligence or fault on their part. *Id.*..... 486

ADMINISTRATION:

Of estate of decedent, see EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION:

1. ADVERSE POSSESSION—OF CITY STREETS. Title to an alley held by a city for public purposes cannot be acquired by adverse possession. *Rapp v. Stratton*..... 263

2. ADVERSE POSSESSION—PAYMENT OF TAXES. Where title to land is claimed by adverse possession and the payment of taxes for seven years, under Bal. Code, § 5503, the claim of title must be made in good faith. *May v. Sutherlin*..... 609

3. ADVERSE POSSESSION—CLAIM AND COLOR OF TITLE—GOOD FAITH—PURCHASE PENDENTE LITE. One who purchases land pending an action to recover possession and quiet the title and, after the judgment of a court of competent jurisdiction against his predecessor, holds possession in defiance of the judgment, is without color of title or good faith, although he was not served with process and no notice of *lis pendens* was filed. *Id.*..... 609

ADVERTISEMENT:

Publication of process, see PROCESS, 1.

ADVICE:

Of attorney as defense, see CRIMINAL LAW, 9.

AFFIDAVITS:

Of nonresidence in appointment of guardian, see INSANE PERSONS, 1.
For publication of summons, see TAXATION, 6.

AGREEMENT:

See CONTRACTS.
Of partnership, termination, see PARTNERSHIP, 1, 2.

ALIENATION:

Removal of restrictions, see INDIANS, 1-3.

AMENDMENT:

Of statute, see STATUTES, 3.
Of pleadings to conform to proof, see APPEAL AND ERROR, 11; PLEADING, 2.

AMOUNT IN CONTROVERSY:

Jurisdictional amount, see APPEAL AND ERROR, 4-7.

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Injuries inflicted by dog carried on street car, see CARRIERS, 1.

APPEAL AND ERROR:

I. NATURE AND JURISDICTION.

Depending upon validity of tax or statute, see APPEAL AND ERROR, 4, 33:

II. DECISIONS REVIEWABLE.

Cessation of controversy, see APPEAL AND ERROR, 29-31.

1. APPEAL—JURISDICTION—APPEALABLE ORDERS—ORDER REFUSING TO VACATE APPOINTMENT OF RECEIVER. An order denying a motion to vacate the appointment of a receiver is an appealable order. *Davis v. Edwards*..... 480

2. APPEAL — DISMISSAL — APPEALABLE ORDERS — STRIKING COMPLAINT FOR MISJOINDER OF CAUSES OF ACTION. An order striking a complaint from the files for the reason that it contained two or more causes of action not separately stated is not a final order and is not appealable. *Vaktaren Pub. Co. v. Pacific Tribune Pub. Co*..... 355

3. APPEAL—APPEALABLE ORDERS—DEFAULT ON FAILURE TO PLEAD OVER. No appeal lies from a judgment of default entered for failure to answer within the time fixed at appellant's request, after sustaining a demurrer to an affirmative defense, when no request was made to set aside the defualt. *Macy v. Sullivan*..... 564

APPEAL AND ERROR—CONTINUED.

4. APPEAL — JURISDICTION — AMOUNT IN CONTROVERSY — LEGALITY OF TAX. A judgment against a county in favor of a taxpayer for the amount of an excessive tax in the sum of $64.56, does not affect the "legality" of a tax, within Const., art. 4, § 4, giving the court jurisdiction in such event in cases involving less than $200, where the question arose through a mere mistake of the assessor in entering the number of acres in the tract, and there was no question as to lack of power to levy the tax, or any controversy as to any rule or construction of law. *Thomas v. Lincoln County*..... 150

5. APPEAL — DISMISSAL — GARNISHMENT — AMOUNT IN CONTROVERSY — JURISDICTIONAL REQUISITE. A garnishment proceeding upon a judgment for $225, upon which $100 had been paid and credited, is an action at law for the recovery of money involving less than $200, and no appeal lies to the supreme court. *Durk v. Scully*..... 357

6. SAME—GARNISHEE—RIGHT OF APPEAL—JUDGMENT—EFFECT—COSTS. A garnishee who claims no interest in a fund of $225 in its hands (less than $200 of which was in controversy between the parties), which was ordered to be paid over to an intervener, without costs to the garnishee, is not entitled to appeal from the judgment on the theory that as to it, the $225 was the amount in controversy. *Id.* 357

7. SAME—COSTS. The failure to award costs to a garnishee against whom no judgment was entered, cannot be made the basis for the right to an appeal by the garnishee. *Id*..... 357

III. PRESERVATION OF GROUNDS.

Findings and conclusions, form, see TRIAL, 9.

8. APPEAL— REVIEW — OBJECTIONS TO PLEADINGS — TRIAL ON AGREED FACTS. Where a case is tried upon an agreed statement of facts, objections to the pleadings may be eliminated from the case on appeal. *Clambey v. Corliss*..... 327

9. APPEAL—REVIEW—ESTOPPEL. An ordinance offered in evidence and excluded at appellant's instance cannot be considered on appeal. *North Yakima v. Scudder*..... 15

10. APPEAL—REVIEW—OBJECTIONS NOT URGED BELOW. Upon appeal from a temporary injunction restraining the operation of a shooting gallery and certain musical instruments, it cannot be claimed that the injunction unnecessarily restrains the operation at all times of the day, where no request was made below to limit the injunction to certain parts of the day. *Grantham v. Gibson*..... 125

11. APPEAL—REVIEW—COMPLAINT—AMENDMENTS. Where proofs were received without objection, the complaint will on appeal be considered amended to conform thereto. *Collins v. Denny Clay Co*.... 136

12. APPEAL—REVIEW—ERROR URGED BY RESPONDENT WITHOUT CROSS-APPEAL. Upon appeal from an order quashing a summons, entered solely upon the ground that the summons was defective in form, the

APPEAL AND ERROR—CONTINUED.

respondents cannot, without taking a cross-appeal, urge error in refusing to grant the motion to quash the summons upon other grounds, to which they took exception. *Lawyer Land Co. v. Steel*..... 411

IV. PARTIES.

Estoppel of party to allege error, see MUNICIPAL CORPORATIONS, 8.

13. APPEAL—PARTIES—RIGHT TO APPEAL. An order correcting a judgment by eliminating the names of certain parties inadvertently included, who were dismissed from the action before judgment, thereby making the judgment speak the truth, is not appealable by the other judgment debtors, as it does not affect their rights, the time for appealing from the original judgment having expired. *Schulze v. Oregon Railroad & Navigation Co.*..... 614

14. SAME—PARTIES AGGRIEVED. Where part of the defendants are dismissed from an action before judgment, and a judgment inadvertently entered against them is subsequently corrected by an order *nunc pro tunc* eliminating their names, they are not parties aggrieved by the modification, and cannot appeal therefrom. *Id.*. 614

V. REQUISITES FOR TRANSFER OF CAUSE.

Time for filing bond, see TAXATION, 13.

Time to apply for certiorari, see CERTIORARI, 1.

15. APPEAL—BOND—CONDITIONED AS COST AND SUPERSEDEAS. Upon appeal from a judgment foreclosing a laborer's lien in the sum of $1,475 with $300 attorney's fees, in which no order of court is made fixing the amount of the supersedeas bond on appeal, an appeal bond in the sum of $200 conditioned also as a supersedeas bond, is sufficient to give the court jurisdiction of the appeal, where it is apparent from the instrument that the condition for a supersedeas was included inadvertently, and there was no attempt to employ the same as a supersedeas, and both parties treated the same as an appeal bond only (RUDKIN and DUNBAR, JJ., dissenting). *Douglas v. Badger State Mine*..... 266

16. APPEAL — DISMISSAL — BONDS — AMOUNT OF SUPERSEDEAS BOND — MONEY JUDGMENT FOR BETTERMENTS IN EJECTMENT. Upon appeal by plaintiff from a judgment in ejectment for the possession of premises, requiring the plaintiff to pay the value of improvements, it is not necessary that the amount of the supersedeas bond on appeal be fixed by the court, and a bond in double the amount of the money judgment and $200 additional is sufficient. *Barton v. Wickizer*. 293

17. APPEAL—BOND—SUPERSEDEAS OF OTHER THAN MONEY JUDGMENT. A judgment for the recovery of a sum of money and the cancellation of a deed, is one other than for the recovery of money, and an appeal and supersedeas bond without any order of court fixing the amount is sufficient to give jurisdiction of the appeal. *Macy v. Sullivan*. 564

APPEAL AND ERROR—CONTINUED.

18. APPEAL—DISMISSAL—NOTICE—FILING PRIOR TO SERVICE—HARMLESS ERROR. Under Bal. Code, § 6503, providing that an appeal shall be ineffectual if not filed within five days after service of notice, the notice of appeal may be filed before service, especially in view of Laws 1899, p. 79, providing that no appeal shall be dismissed for any defect in the notice or service thereof. *Lawyer Land Co. v. Steel*..... 411

VI. EFFECT AND STAY.

Supersedeas bond on appeal, see APPEAL AND ERROR, 15-17.

VII. RECORD.

19. APPEAL—RECORD—SERVICE OF PAPERS—SUPPLEMENTAL RECORD. A motion to strike a statement of facts and briefs because not duly filed or served will be denied where a supplemental record is filed negativing the grounds of the motion. *Ogden v. Chehalis County*..... 45

20. APPEAL—STATEMENT OF FACTS—PLACE OF CERTIFICATION. Where no amendments are proposed to a statement of facts in a case tried before a visiting judge, the same may be certified outside of the county or judicial district in which the case was tried. *Downs Farmers Warehouse Ass'n v. Pioneer Mutual Ins. Ass'n*..... 372

21. APPEAL AND ERROR—REVIEW—NEW TRIAL. The granting of a new trial will not be reversed when the ground for granting the same does not appear from the record or the briefs. *Short v. Spokane*..... 257

22. APPEAL—REVIEW—STATEMENT OF FACTS. An order revoking letters of administration will not be reviewed on appeal in the absence of a bill of exceptions or a statement of facts. *In re Farnham's Estate*..... 570

23. APPEAL—RECORD—STATEMENT OF FACTS. In the absence of a statement of facts errors based upon the evidence cannot be reviewed *Hotel Co. v. Merchants Ice & Fuel Co*..... 620

24. APPEAL—RECORD—STATEMENT OF FACTS—CONTENTS—FAILURE OF COMMISSIONERS TO RETURN EVIDENCE—SUBSEQUENT FILING AND CONSIDERATION—WHEN NOT PART OF RECORD. Where the testimony taken before commissioners is not returned with their report, but is afterwards transcribed and filed in the cause by one of the parties, and thereafter considered by the parties and the court in considering the report, it is not a part of the record within the purview of Bal. Code, § 5064, so providing as to testimony returned into court by the commissioners with their report; hence it must be made a part of the statement of facts in order to be considered on appeal. *State ex rel. Richardson v. Superior Court*..... 439

APPEAL AND ERROR—CONTINUED.

25. SAME—MANDAMUS—COMPELLING CERTIFICATION OF STATEMENT OF FACTS—WHEN LIES. Evidence taken before commissioners not returned by them, but subsequently transcribed and considered by the court, without objection, is proper for the consideration of the supreme court on appeal, and the lower court will be compelled by mandate to embody the same in the statement of facts, where he has refused so to do; and the fact that he had already certified to a statement not embodying the same is no defense to the application. *Id*..... 439

26. SAME—EXTENSION OF TIME FOR FILING. Error in refusing an extension of time for filing a statement of facts will not be reviewed where the entire 90 days within which the statement could be served and filed has expired without the filing of any statement. *Hotel Co. v. Merchants Ice & Fuel Co*..... 620

VIII. BRIEFS.

Striking briefs not duly filed or served, see APPEAL AND ERROR, 19.

27. APPEAL AND ERROR—BRIEFS—STRIKING FOR FAILURE TO CONTAIN FINDINGS. Appellants' brief on appeal will not be struck out for failure to print the findings of fact when they are thereafter printed in the reply brief. *Thompson v. Benson*..... 70

28. APPEAL—ASSIGNMENT OF ERRORS—BRIEFS—STRIKING. A brief assigning fifty-nine errors, in which only three questions of law are discussed at length, will not be struck out for failure to discuss each error or to confine the discussion to the errors assigned, where the respondent has retaliated to the argument with a brief of 160 pages. *Sawyer v. Vermont Loan and Trust Co*..... 524

IX. MOTIONS AND DISMISSALS.

Notice, filing prior to service, see APPEAL AND ERROR, 18.

29. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. An appeal from a judgment against a county will not be dismissed on the ground of the cessation of the controversy, from the fact of a satisfaction of the judgment and the issuance of a warrant by the county auditor, where it appears that the satisfaction was entered pursuant to Bal. Code, § 5676, for the purpose of securing a warrant for its payment, which is in lieu of an execution, and it does not appear that the county authorities have ever authorized a voluntary payment, but the case stands as an ordinary case where execution has been levied. *Ogden v. Chehalis County*..... 45

30. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—ENACTMENT OF ORDINANCE PROVIDING FOR PAYMENT—COSTS. Where, after an appeal from the dismissal of an action to recover an excessive assessment, the city passed an ordinance providing for repayment of the assessment, the appeal will be dismissed, with costs to the appellant, on the ground that the controversy has ceased. *Miller v. Seattle*.. 599

APPEAL AND ERROR—CONTINUED.

31. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—PROOF. A case in the supreme court will not be dismissed because of the cessation of the controversy unless such fact is shown by clear and satisfactory proof; and a signed statement that the case has been settled is not sufficient where it is disputed and claimed to have been signed through mistake and fraud. *State ex rel. Lowary v. Superior Court*..... 450

X. REVIEW.

Review in criminal prosecutions, see CRIMINAL LAW, 5, 7, 12-18.
Comment on facts, see TRIAL, 3.
Conduct of counsel, see TRIAL, 2.
Condemnation proceedings, verdict assessing damages, see EMINENT DOMAIN, 1.
Of appointment of commissioners to establish lost boundary, see BOUNDARIES, 3.
Review of evidence for divorce, see DIVORCE, 1.
Review of evidence for personal injuries, see MASTER AND SERVANT.
Proceedings of land office, see PUBLIC LANDS, 2.
Of municipal vacation of street, see MUNICIPAL CORPORATIONS, 21.
Setting cause for trial, see TRIAL, 1.
Matters reviewable as determined by record, see APPEAL AND ERROR, 21, 24, 25.
Harmless error in submitting question to jury, see MASTER AND SERVANT, 29.

32. APPEAL—REVIEW—DISCRETION—APPOINTING SUCCESSOR TO ADMINISTRATOR. Where letters of administration are properly revoked, the discretion of the trial court in appointing a successor will not be reviewed on appeal. *In re Farnham's Estate*..... 570

33. APPEAL—JURISDICTION—VALIDITY OF STATUTE SOLE GROUND—QUESTIONS REVIEWABLE. Upon an appeal in which the jurisdiction of the appellate court depends upon the validity of a statute, the court will not review other errors assigned not involving such question. *Gies v. Broad*..... 448

34. APPEAL—REVIEW—HARMLESS ERROR. Error in allowing answers to immaterial questions is not prejudicial to the appellants when the answers thereto were unfavorable to the respondent. *Shannon v. Tacoma*..... 220

35. SAME. In an action for injuries received in a fall upon a defective sidewalk, it is harmless error to exclude evidence to the effect that a week after the accident a hole was found in the sidewalk and near by a broken piece of board, where it was conceded that there was such a hole in the sidewalk, and that the boards were decayed, the testimony being only cumulative. *Id*..... 220

APPEAL AND ERROR—CONTINUED.

36. APPEAL—REVIEW—HARMLESS ERROR—DAMAGES—SPECIAL VERDICT. In an action for damages for personal injuries, error in admitting immaterial evidence as to an item of damage is harmless where a special verdict was rendered and the damages for such item were eliminated and deducted from the judgment. *Brown v. Blaine*. 287

37. APPEAL — REVIEW — EVIDENCE OF MATTERS ADMITTED — HARMLESS ERROR. In an action for personal injuries sustained in a fall upon a defective sidewalk, it is not prejudicial error to allow a witness to testify to the boards being loose, although the same was immaterial. *Id*..... 287

38. APPEAL—TRIAL DE NOVO—EVIDENCE—HARMLESS ERROR. The admission of improper evidence in a case tried before the court without a jury is harmless. *Esktrand v. Barth*..... 321

39. APPEAL—TRIAL DE NOVO—RECEPTION OF INCOMPETENT EVIDENCE—HARMLESS ERROR. Upon a trial *de novo* in the supreme court of an action at law tried without a jury, a case will not be reversed because of the reception of incompetent evidence where there was other competent testimony sustaining the findings. *Teater v. King*..... 134

40. APPEAL—RECORD—CONDEMNATION—VERDICT—REVIEW. A view by the jury in a condemnation case does not preclude the appellate court from a review of the questions of fact. *In re East Spring Street*..... 366

41. APPEAL—REVIEW—FINDINGS—CONFLICTING EVIDENCE. Findings of the trial court upon conflicting evidence in an equitable action will not be disturbed on appeal where the supreme court is unable to say that the evidence does not preponderate in favor of the respondent. *Brill v. Hayford*..... 468

42. APPEAL—REVIEW—VERDICT UPON CONFLICTING EVIDENCE. The verdict of a jury upon conflicting evidence upon an issue as to negligence is conclusive on the supreme court after the refusal of the lower court to grant a new trial. *Druglis v. Northwestern Imp. Co*..... 398

43. APPEAL AND ERROR — REVIEW — VERDICT CONTRARY TO ERRONEOUS INSTRUCTIONS—ERROR WITHOUT PREJUDICE. Where a landlord is liable to his tenant for damage caused by the negligence of contractors in remodeling the building, the verdict of a jury against the landlord will not be set aside because contrary to an erroneous instruction to the jury to the effect that the landlord would not be liable for the negligence of the contractors. *Bancroft v. Godwin*..... 253

XI. DETERMINATION AND DISPOSITION OF CAUSE.

Costs, see APPEAL AND ERROR, 30.

44. APPEAL—DECISION—LAW OF CASE. Upon the second appeal of a cause the decision on the first appeal as to the sufficiency and com-

APPEAL AND ERROR—CONTINUED.

petency of the same evidence introduced at the first trial is conclusive. *Teater v. King*..... 134

45. APPEAL—FORMER DECISION—LAW OF CASE. Upon a second appeal of a cause the decision on the first appeal becomes the law of the case. *Cook v. Stimson Mill Co*..... 314

46. TRIAL — LAW OF CASE — CONTRACT TO ORGANIZE CORPORATION — FORMER CONSTRUCTION. Where W and G, two of the joint owners of a mine, entered into a contract whereby one of them agreed to organize a corporation, making a certain appropriation of the capital stock, "the remainder of the stock to be divided equally between said W and other owners than said G," and the supreme court on appeal has construed such contract to entitle the other owners to their proportion of the stock, it becomes the law of the case; and on a second appeal it cannot be objected that the contract was signed only by W and G, and that the other owners were not interested therein (MOUNT, C. J., dissenting). *Grant v. Walsh*..... 542

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT.

APPOINTMENT:

Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 3, 9.

Of guardian, see GUARDIAN AND WARD, 1, 2; INSANE PERSONS, 1-3.

Of receiver, see RECEIVERS, 1-4.

APPORTIONMENT:

Of assessments for public improvements, see MUNICIPAL CORPORATIONS, 10.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 2.

In criminal prosecutions, see CRIMINAL LAW, 14.

ARRAIGNMENT:

See CRIMINAL LAW, 17, 18.

ASSAULT WITH INTENT TO MURDER:

Evidence, admissibility, intent, see CRIMINAL LAW, 6, 7, 15.

ASSESSMENT:

Compensation for property taken or injured for public use, see EMINENT DOMAIN, 1.

Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 3-16.

On stock subscription, necessity, see CORPORATIONS, 3.

Ordinance providing for repayment, as cessation of controversy, see APPEAL AND ERROR, 30.

ASSIGNMENT OF ERRORS:

See APPEAL AND ERROR, 28.

ASSIGNMENTS:

Of contract for maintenance, see CONTRACTS, 1.

Of liquor license, see INTOXICATING LIQUORS, 1; PLEDGES, 1.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 4, 11-18.

ATTACHMENT:

Exemptions, see HOMESTEAD.

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Of incompetent at appointment of guardian, see GUARDIAN AND WARD, 1, 2.

ATTORNEY AND CLIENT:

Advice as defense in criminal prosecution, see CRIMINAL LAW, 9.

Appointment of counsel for accused, see CRIMINAL LAW, 17.

Argument and conduct of counsel at trial in civil actions, see TRIAL, 2; In criminal prosecutions, see CRIMINAL LAW, 14.

Authority to compromise claim for death, see COMPROMISE AND SETTLEMENT, 1.

Authority to satisfy judgment against municipality, see JUDGMENT, 7.

Attorney's fees as damages on injunction bond, see INJUNCTION, 1, 2.

Allowance to receiver for counsel fees, see RECEIVERS, 11.

Excusable neglect of counsel, see JUDGMENT, 6.

1. ATTORNEY AND CLIENT—AUTHORITY TO SATISFY JUDGMENT OF INFANT. An attorney employed by a guardian *ad litem* to prosecute an action for a minor has authority to receive payment of the judgment and enter satisfaction thereof, where there is no general guardian, especially in view of Bal. Code, § 4766, providing that attorneys may receive payment, and acknowledge satisfaction, of judgments. *State ex rel. Lane v. Ballinger*..... 23

2. ATTORNEY AND CLIENT—AUTHORITY—WHO MAY QUESTION—RATIFICATION. A third person has no right to question the authority of an attorney for the purpose of collection, who takes a deed in settlement of the claim and records the same without notice to the client, especially where the client ratified such action. *Sawyer v. Vermont Loan and Trust Co*..... 524

AUTHORITY:

Of attorney, see ATTORNEY AND CLIENT, 1, 2; COMPROMISE AND SETTLEMENT, 1.

Of guardian *ad litem*, see INFANTS, 1.

BANKS AND BANKING:

Recovery of deposit paid by mistake, see MONEY RECEIVED, 1.

BAR:

Of action by limitation, see LIMITATION OF ACTIONS.

BARBERS:

Regulation and license, see CONSTITUTIONAL LAW, 1.
Barbering on Sunday, sufficiency of information, see CRIMINAL LAW, 1.

BENEFITS:

Deduction of, in local improvements, see MUNICIPAL CORPORATIONS, 8-12.

BETTERMENTS:

Recovery for in ejectment, see EJECTMENT, 2, 3.

BILL OF SALE:

Necessity of recording, see PLEDGES.

BILLS AND NOTES:

Contribution between co-sureties, see LIMITATION OF ACTIONS, 2.
Taking note from joint obligor, as election of remedy, see MONEY RECEIVED, 1.

1. BILLS AND NOTES — INDORSERS BEFORE DELIVERY AS CO-SURETIES. Stockholders of a corporation who indorse the company's note before delivery for the purpose of enabling the company to borrow money for use in its business, are *prima facie* joint makers who are in fact co-sureties. *Caldwell v. Hurley*..... 296

2. SAME—PAYMENT BY ONE CO-SURETY—CONTRIBUTION. An action for contribution lies between endorsers before delivery who sign a promissory note as *prima facie* makers and in fact as co-sureties of the principal maker. *Id*..... 296

3. BILLS AND NOTES—ONE OF MAKERS SURETY ONLY—PROOF—PAROL EVIDENCE—COMPETENCY. A co-maker of a promissory note, who signs as surety only, may show such fact by parol evidence and that the payee had knowledge thereof. *Baldwin v. Daly*..... 416

4. BILLS AND NOTES—RELEASE OF SURETY BY PAROL—STATUTE REQUIRING WRITING—CONSTRUCTION. Under Laws 1899, p. 361, providing that a "renunciation" of a negotiable instrument must be in writing, a surety thereon is not entitled to show that he had been released by parol. *Id*..... 416

5. BILLS AND NOTES — PAYMENT — WHAT CONSTITUTES — DEPOSIT BY SURETY AS SECURITY FOR JUDGMENT AGAINST PRINCIPAL MAKER—CONTRACTS—CONSTRUCTION. Payment of a promissory note by a joint maker who claimed to have signed as surety only, is not shown

BILLS AND NOTES—CONTINUED.

where it appears that the surety, after giving notice to the bank of the suretyship, and requesting suit to be instituted against the principal maker, entered into a written agreement with the bank, and with its president acting as a trustee and not in his official capacity, under the terms of which the surety deposited with the trustee a sum sufficient to pay the note and costs of suit, to be held until final judgment against the principal maker, and the bank agreed to at once institute a suit thereon without making the surety a party defendant, the deposit to be returned in case of payment by the principal maker, and the judgment to be assigned to the surety if not paid; it being a prerequisite to the bank's receiving the deposit that it should reduce the claim to judgment; and it being specifically stipulated that the transaction should not be considered a payment of the note, but that the deposit shall be held only as security for any judgment that might be obtained (ROOT, J., dissenting). *Capital National Bank v. Robinson*..... 454

6. BILLS AND NOTES—CONSTRUCTION. A promissory note for a certain sum, with interest, reciting that "this note is given as a security of said C. [the payee] with an assignment of scrip," to be issued for public lands within six months, and providing that the assignment was to be returned if the scrip was not issued, and the scrip to be returned upon payment of the note, should be construed as meaning that the note and assignment of scrip were given as security for the money borrowed, and not that the note was given as security for the assignment of the scrip in case the same was not issued, under the liberal rule of construction of pleadings first assailed at the trial. *Carey v. Hays*..... 580

BONA FIDE PURCHASER:

See DEEDS, 2-4.
Pending suit, see ADVERSE POSSESSION, 3.
Notice of unacknowledged mortgage, see MORTGAGES, 1.
Of real estate at executor's sale, see EXECUTORS AND ADMINISTRATORS, 7.
Recovery for improvements, see EJECTMENT, 2, 3.

BONDS:

See INJUNCTION, 1, 2.
Indemnity bonds, see INDEMNITY.
On appeal, construction, sufficiency, see APPEAL AND ERROR, 15-17.

BOUNDARIES:

1. BOUNDARIES—ESTABLISHMENT—EVIDENCE. The monuments established by the official surveys control the field notes and other proof of the location of a government corner, but in the absence of other evidence the field notes control. *Stangair v. Roads*..... 583

BOUNDARIES—CONTINUED.

2. SAME—EVIDENCE—FIELD NOTES. Where a government corner is lost, and the surveyor who established the corner fifty years ago is unable to explain the many material discrepancies between his own field notes and those returned to his superior officer, the certified copy of the field notes recorded in the surveyor general's office should have greater weight and will not be overturned by evidence of the field notes of the surveyor. *Id*..... 583

3. SAME—APPOINTMENT OF COMMISSIONERS—DISCRETION. The appointment of commissioners under Bal. Code, § 5668, to establish a disputed boundary, rests in the discretion of the trial court, and is not subject to review on appeal. *Id*..... 583

4. SAME—EVIDENCE—DECLARATIONS—COMPETENCY. In an action to establish a disputed boundary, declarations of the appellant's deceased father are inadmissible. *Id*..... 583

BREACH:

Of contract, see CONTRACTS, 1, 4, 5; VENDOR AND PURCHASER, 4-7.
Of subrogation clause, see INSURANCE, 7.
Of warranty, see SALES, 1, 2.

BRIEFS:

On appeal, see APPEAL AND ERROR, 27-28.

BROKERS:

1. BROKERS—COMMISSIONS FOR SALE OF RANCH—AUTHORITY TO NEGOTIATE SALE—EVIDENCE—SUFFICIENCY. In an action for a broker's commissions, a finding for the defendant will be sustained where the broker alone testified as to the existence of the contract, and he was contradicted by the respondent and two other witnesses. *Krug v. Hendricks*..... 410

BUILDING CONTRACTS:

See CONTRACTS, 7-9; PLEADING, 1.

BUILDINGS:

Breach of building contracts, see CONTRACTS, 7-9; PLEADING, 1.
Damages from removal of lateral support, see ADJOINING LANDOWNERS, 1-5.

BURDEN OF PROOF:

See ACCOUNT, 4; INSURANCE, 1.
To show title, see PARTITION, 1.

CANCELLATION OF INSTRUMENTS:

Rescission of contracts, see VENDOR AND PURCHASER, 3-6.
Judgment, supersedeas on appeal, see APPEAL AND ERROR, 17.

CAPITAL:

Of corporations in general, see CORPORATIONS, 1.

CARRIERS:

1. CARRIERS—INJURY TO PASSENGERS—CARRYING DOGS IN STREET CARS. A street car company is liable to a passenger for injuries inflicted by a dog belonging to a fellow passenger which the company permitted to be carried in a passenger coach. *Westcott v. Seattle etc R. Co*..... 618

2. CARRIERS—NEGLIGENCE—PASSENGER ALIGHTING FROM STREET CAR—QUESTION FOR JURY. In an action for personal injuries sustained in falling from a street car, it cannot be said as a matter of law that the street car company was free from negligence or that the plaintiff was guilty of contributory negligence, and it is error to direct a verdict for the defendant, where there was a conflict in the testimony as to the custom of stopping cars on the far side of a certain street intersection, and it appears from the plaintiff's testimony that, after having stopped at the switch on the other side of the intersection, the plaintiff informed the conductor that he desired to stop at said street, and insisted upon his right to do so, whereupon the conductor signalled to the motorman to stop the car, and the plaintiff took his position on the lower step with his hand on the extension rod to alight, while the car was slowly approaching the far side of the street; that instead of stopping, the speed of the car was increased 8 or 10 miles an hour, and the plaintiff was thrown or hurled from the same, without fault on his part; since notwithstanding conflicting evidence, the testimony of the plaintiff must be accepted and the jury might infer therefrom that the failure to stop the car in obedience to the signal was the proximate cause of the injury, and that the plaintiff had a right to presume that the car would come to a stop, and to act upon that presumption. *Weir v. Seattle Electric Co*..... 657

CERTAINTY:

Of complaint in civil action, see PLEADING, 1; in criminal prosecutions, see CRIMINAL LAW, 1.

CERTIFICATE:

Receiver's certificates, priority, see RECEIVERS, 5, 8, 9.

CERTIFICATION:

Of statement of facts, see APPEAL AND ERROR, 20, 25.

CERTIORARI:

1. CERTIORARI — TIME FOR APPLICATION — EXCUSE FOR DELAY — ILL HEALTH AND INCOMPETENCE OF APPLICANT. While ordinarily an application for a writ of certiorari must be made within the time limited

CERTIORARI—CONTINUED.

for taking an appeal, sufficient excuse is shown for delay in applying for a writ to review an order appointing a guardian for the applicant, where it appears that the applicant was ill and unable to act, and the respondent had alleged that she was incompetent. *State ex rel. Lowary v. Superior Court*..... 450

CHATTEL MORTGAGES:

Redemption, see ACCOUNT, 4.
Necessity of recording, see PLEDGES.

1. CHATTEL MORTGAGES — ABSOLUTE SALE — EVIDENCE — RELEASE OF EQUITY OF REDEMPTION. The evidence is sufficient to establish that an absolute sale of corporate stock in consideration of the discharge of a settled account, accompanied by an option to repurchase the stock within a specified time, was intended as a mortgage to secure the debt, where it appears that the relation of debtor and creditor had existed for some years, that the debtor was insolvent, that the total indebtedness was less than $8,000 and the value of the stock conveyed exceeded $27,000, and the short period of four months was allowed to the debtor in which to pay the indebtedness and reclaim the stock; since, where the consideration is grossly inadequate, the courts will look with disfavor upon any relinquishment of the right of redemption, and hold that the original relation continues. *Collins v. Denny Clay Co*..... 136

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Equal protection of laws, see CONSTITUTIONAL LAW, 1-3.

CLAIMS:

Against city, presenting, see MUNICIPAL CORPORATIONS, 1, 2, 27.
Against property in hands of receiver, see RECEIVERS, 5, 8-10.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 1, 3.

CLERKS OF COURTS:

Error in recording judgment, effect, see JUDGMENT, 2.

COLLATERAL ATTACK:

On order appointing successor, see EXECUTORS AND ADMINISTRATORS, 3.
Sale of real estate by executor, see EXECUTORS AND ADMINISTRATORS, 5, 7.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 2, 3.

COMMISSIONERS:

Testimony taken by, review of, see APPEAL AND ERROR, 24, 25.
To establish lost boundaries, see BOUNDARIES, 3.

COMMISSIONS:

Of broker, see BROKERS, 1.

COMMUNITY PROPERTY:

See DESCENT AND DISTRIBUTION, 1.
Land acquired by patent, see PUBLIC LANDS, 4, 5.
Lands allotted to Indian, see INDIANS, 1-3.

COMPENSATION:

Of receiver, see RECEIVERS, 11.
Of justices of the peace, see JUSTICES OF THE PEACE, 1.
For property taken or damaged for public use, see EMINENT DOMAIN, 1.

COMPETENCY:

Of evidence in criminal prosecutions, see CRIMINAL LAW, 6, 8.
Of experts as witnesses, see EVIDENCE, 1; SALES, 2.

COMPLAINT:

In civil actions, see PLEADING.
In criminal prosecutions, see CRIMINAL LAW, 1-5.

COMPROMISE AND SETTLEMENT:

Of claim by attorney for collection, see ATTORNEY AND CLIENT, 2.
As estoppel to recover damages for breach of building contract, see CONTRACTS, 7.

1. COMPROMISE AND SETTLEMENT — ATTORNEY AND CLIENT — LIMITATION OF AUTHORITY—NOTICE—QUESTION FOR JURY. It is for the jury to determine whether a claim for a death loss has been compromised by the payment of $500 to an attorney for the widow of the deceased, when, according to strong evidence, the defendant was informed that the attorney's authority was limited to the acceptance of $5,000 to be paid in the presence of the widow, and the widow repudiated the settlement soon after learning of it, and returned the check for the money which she received from the attorney. *Erickson v. McNeeley & Co*..... 509

2. EVIDENCE—COMPROMISE—SIMILAR TRANSACTIONS. Upon an issue as to the settlement of accounts, evidence of the settlement of another controversy is inadmissible where the parties were not the same and one settlement did not influence the other. *Collins v. Denny Clay Co*..... 136

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

Of realty, see VENDOR AND PURCHASER, 1 2.

CONFIRMATION:

Of sale of land claimed as homestead, see HOMESTEAD, 1, 2.
Of receiver's sale, vacation, see RECEIVERS, 7.

CONFLICT OF LAWS:

Domicile as governing the joinder of parties, see HUSBAND AND WIFE, 1.
Judgment on foreign liability, see LIMITATION OF ACTIONS, 4.
When Federal laws govern as to homesteads, see PUBLIC LANDS, 4, 5.

CONSIDERATION:

Inadequacy establishing sale as mortgage, see CHATTEL MORTGAGES, 1.
For release of surety, see PRINCIPAL AND SURETY, 1.
Of contract for sale of lands, see VENDOR AND PURCHASER, 2-5.

CONSTITUTIONAL LAW:

Amendment of statutes, see STATUTES, 3.
Subjects and titles of statutes, see STATUTES, 1-3.

1. CONSTITUTIONAL LAW—SPECIAL LEGISLATION—PROHIBITING BARBERING ON SUNDAY—VALIDITY OF STATUTE. Laws 1903, p. 68, prohibiting the business of barbering on Sunday, does not violate the constitutional prohibitions against class legislation or special privileges, nor the Federal constitutional prohibitions against abridging the privileges of a citizen or the taking of liberty or property without due process of law, even as to those who conscientiously believe in the observance of the seventh day of the week (RUDKIN, J., dissenting). *State v. Bergfeldt*..... 234

2. CONSTITUTIONAL LAW—POLICE POWER—PROHIBITING SALE OF RAILROAD TICKETS—LICENSED AGENTS—STATUTORY REGULATION. Laws 1905, p. 376, providing that none but a duly authorized agent of a railroad company shall be permitted to sell railway transportation, does not deprive a citizen, who was already established in such business prior to the enactment of the law, of property without due process of law, or unduly interfere with his liberty to pursue his occupation; since it is a valid exercise of the police power to make reasonable regulations to protect the traveling public and prevent the perpetration of frauds in the sale of railway tickets. *In re O'Neill*.... 174

3. SAME—EQUAL PROTECTION OF LAWS—SPECIAL PRIVILEGES. Laws 1905, p. 376, prohibiting the business of railroad ticket brokerage, and requiring railroad companies to duly commission all agents au-

CONSTITUTIONAL LAW—CONTINUED.

thorized to sell tickets and to redeem unused tickets, does not deny the equal protection of the laws, since it rather imposes duties upon, than grants special privileges to, the railroad companies. *Id.*... 174

4. LABOR—PUBLIC WORK—FIXING MINIMUM WAGE FOR DAY'S WORK—CONSTITUTIONAL LAW—ORDINANCE—VALIDITY. An ordinance prescribing the minimum wage to be paid for a day's labor upon public work undertaken by a city is not unconstitutional, as it is within the power of the state or city to prescribe the conditions upon which it would permit its public work to be done. *Gies v. Broad*.... 448

5. SAME—DELEGATION OF LEGISLATIVE POWER. An act making it a misdemeanor for any one except authorized agents of a railroad company to sell railroad tickets, and requiring companies to commission their agents, is not unconstitutional as delegating to the companies the power to say who are guilty of the offense by issuing or withholding the authority. *In re O'Neill*..... 174

6. CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—VACATION OF STREETS. The vacation of streets is a legislative function which may be delegated by the legislature to municipal corporations. *Ponischil v. Hoquiam Sash and Door Co*..... 303

7. SAME—STATUTES—PARTIAL UNCONSTITUTIONALITY. The unconstitutionality of part of an act imposing the burden of proof upon the accused would not affect the balance of the act declaring the selling of railway tickets by unauthorized agents to to be a misdemeanor. *In re O'Neill*..... 174

CONTINUANCE:

Review on appeal, see CRIMINAL LAW, 16.
On grounds of surprise, see NEW TRIAL, 2.

CONTRACTORS:

Breach of building contracts, see CONTRACTS, 7-9; PLEADING, 1.
Indemnity bond, delivery, agent of surety, see INDEMNITY, 1.
Negligence in remodeling demised building, see LANDLORD AND TENANT, 1, 2.

CONTRACTS:

Agreements within the statute of frauds, see FRAUDS, STATUTE OF.
Construction, see APPEAL AND ERROR, 46; BILLS AND NOTES, 6.
Damages for technical breach, see DAMAGES, 8.
To deliver water, enforcement by mandamus, see MANDAMUS, 1.
Of indorsement, see BILLS AND NOTES, 1, 2.
Of insurance, when effective, see INSURANCE, 4-6.
For local improvement, letting, review, see MUNICIPAL CORPORATIONS, 6.

CONTRACTS—CONTINUED.

Partnership agreement, see PARTNERSHIP, 1, 2; SPECIFIC PERFORMANCE, 1.

Reformation, see REFORMATION OF INSTRUMENTS.

For sale of realty, see VENDOR AND PURCHASER, 1, 2.

With broker to sell property, see BROKERS, 1.

Relating to stock, construction and purchase price, see CORPORATIONS, 1.

Of surety and payee as to suit against principal, see BILLS AND NOTES, 5.

1. CONTRACTS — PERSONAL SERVICE—MAINTENANCE—BREACH—RESTORING CONSIDERATION. An obligation of a son to support his parents in consideration of a conveyance of land is personal and cannot be assigned without consent of the parents, and upon failure of the son to perform the contract, the right of the parents to be restored to their property immediately vests. *Ford v. Kimble*..... 573

2. SAME—RIGHTS OF HEIRS. Where premises were conveyed to a son, in consideration of which he agreed to support his parents during their lives, upon the death of the son without performance of the contract the equitable title to the property revests in the parents, and the heirs of the son acquire no interest therein. *Id*..... 573

3. SAME—VOLUNTARY CANCELLATION—EXECUTION OF NEW AGREEMENT. Where a son agreed to support his parents in consideration of the conveyance of premises, the parties may thereafter agree to cancel the contract and enter into another agreement whereby the son was to support his mother, and a daughter was to support her father, and each was allotted a certain portion of the premises in consideration thereof, and the heirs of the son can raise no objection thereto. *Id*..... 573

4. CONTRACT—BREACH—RESCISSION—FINDINGS—SUFFICIENCY TO SUPPORT JUDGMENT. Where the main consideration for the leasing of a quarry was an agreement by the lessors not to engage in the business of quarrying or selling rock within a specified territory findings by the court to the effect that there was a violation of this agreement would be sufficient to support a judgment releasing the lessee from further obligation to perform the contract upon his part; and the fact that one of the findings erroneously states the foregoing agreement to be the sole consideration for the lease is immaterial. *Dishman v. Huetter*..... 626

5. SAME—RESCISSION—PLEADING AND PROOF—RECOVERY FOR MISTAKE NOT ALLEGED. In such a case, upon breach of the contract by the lessors and a rescission of the same by the lessee, the lessors could not recover, in an action brought upon the contract, the value of rock removed by the lessee by mistake after the rescission, in the absence of an amendment, nor would such facts support a judgment for the value of the rock removed by mistake, in the absence of any evidence or findings as to such value. *Id*..... 626

CONTRACTS—CONTINUED.

7. CONTRACTS—FOR BUILDING HOUSE—DAMAGES FOR DEFECTS—PAYMENT AND ACCEPTANCE—ESTOPPEL—NO KNOWLEDGE OF DEFECTS. The owner of premises is not estopped to recover damages for the defective construction of a building by the acceptance of the work and a settlement with the contractors and by the fact that she was present during the progress of the work, where it appears that she was inexperienced and had no knowledge of the defect until after payment had been made, and relied upon the contractors as friends to properly build the house. *Ekstrand v. Barth*..... 321

8. DAMAGES—BREACH OF BUILDING CONTRACT—SALE OF PREMISES BEFORE SUIT. Damages sustained by the owner of premises by reason of the contractors' breach of a building contract are personal to the owner and do not abate upon a sale of the premises before suit. *Id*..... 321

9. CONTRACTS—EVIDENCE—BUILDING INSPECTOR'S APPROVAL OF LOCATION OF BUILDING ENCROACHING UPON STREET—COMPETENCY. In an action for damages against contractors for improperly building and locating a house partly in the street, evidence that the city building inspector approved the building, is incompetent where it is admitted that the building encroached upon the street contrary to the terms of the defendants' contract to properly locate it. *Id*..... 321

10. CONTRACTS—EMPLOYMENT—AMOUNT OF SALARY—EVIDENCE—SUFFICIENCY. Upon an issue as to the amount of plaintiff's salary under a contract of employment, a clear and positive statement by the plaintiff that the same was to be a certain sum for five months and at the same rate if longer engaged, supported by a general statement as to the nature of his duties and responsibilities, amounts to substantial evidence requiring the denial of a motion for nonsuit, although his statements are positively denied by two witnesses. *McCowan v. Northeastern Siberian Co*..... 675

11. SAME—EVIDENCE—ADMISSIBILITY—EXTENT OF BUSINESS. Upon an issue as to the amount of salary agreed upon in a special contract, evidence as to the character of the business of the employer and the extent of its business is relevant and admissible to show the probability of the contract. *Id*..... 675

12. SAME—CAPITAL STOCK OF CORPORATION. Upon an issue as to the making of a contract of employment with a corporation, the receipt of evidence of the amount of the capital stock of the defendant, brought out on the cross-examination of a witness in showing the interest of the witness in the controversy as a stockholder, is not prejudicial error. *Id*..... 675

CONTRIBUTION:

Between co-sureties, limitation, see LIMITATION OF ACTIONS, 2.
Between indorsers, see BILLS AND NOTES, 2.

CONTRIBUTORY NEGLIGENCE:

Of fellow servant, see MASTER AND SERVANT, 9.
Of passenger, see CARRIERS, 2.
Of servant, see MASTER AND SERVANT, 18-26, 30, 32.
Injury through defective sidewalk, see MUNICIPAL CORPORATIONS, 28, 33.
With respect to fire, see RAILROADS, 1, 2.

CONVEYANCES:

See DEEDS; EXECUTORS AND ADMINISTRATORS, 4-7.
Contracts to convey, see VENDOR AND PURCHASER, 1, 2.

CORAM NOBIS:

Writ of, see CRIMINAL LAW, 5.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.
Contract of employment, evidence, see CONTRACTS, 10-12.
Employment of stockholders, see RECEIVERS, 10.
Indorsement of corporation note by stockholders, see BILLS AND NOTES, 1, 2.
Insolvency, see RECEIVERS, 1-4.

1. CORPORATIONS—CONTRACT FOR ORGANIZATION—DIVISION OF STOCK—CONSTRUCTION. Upon an action by the assignee of former owners of a mine to recover certain capital stock in a corporation, agreed by the defendant to be delivered to such owners as the purchase price of the mine, the defendant is entitled to a deduction of the stock which all of the parties had subsequently agreed should be set aside for the benefit of the company (MOUNT, C. J., dissenting). *Grant v. Walsh*..... 542

2. CORPORATIONS—INSOLVENCY—SUBSCRIPTIONS—ACTION BY CREDITOR—LIMITATIONS. The right of action in favor of creditors of an insolvent corporation against its stockholders to enforce the stock subscription liability accrues at least as soon as the corporation disposes of all its assets, ceases to do business as a going concern and becomes notoriously insolvent. *Chilberg v. Siebenbaum*..... 663

3. SAME—NECESSITY OF CALL OR ASSESSMENT. After the declared or notorious insolvency of a corporation, the liability of the stockholders upon their undue stock subscriptions becomes fixed and immediately due without the necessity for a call or assessment thereon. *Id*..... 663

4. SAME—JUDGMENT AND RETURN OF NULLA BONA. Upon the insolvency of a corporation, an action by a creditor upon a demand against the corporation does not suspend the running of the statute of limitations as against stockholders until the recovery of judgment, and the corporate debt is not merged in such judgment, as judgment and return of *nulla bona* is not necessary where it is shown that the same would be futile. *Id*..... 663

CORPORATIONS—CONTINUED.

5. SAME—CONTINUATION OF LIABILITY. The stockholders of an insolvent corporation do not continue liable upon stock subscriptions as long as liability exists against the corporation. *Id.*..... 663

6. SAME—NOTICE TO CREDITOR OF UNPAID SUBSCRIPTIONS. The creditor of an insolvent corporation cannot claim that his right of action against stockholders upon their unpaid stock subscriptions does not accrue until notice that there were unpaid subscriptions was brought home to him, in the absence of fraud or concealment, since under Bal. Code, § 4269, the creditor had access to the corporate books and opportunity to ascertain the facts. *Id.*..... 663

7. EVIDENCE—CORPORATE STOCK—VALUE. Upon an issue as to the value of the stock of a corporation whose sole object was to hold lands, the value of the lands is competent to show the value of the stock. *Collins v. Denny Clay Co*..... 136

COSTS:

On appeal, see APPEAL AND ERROR, 30.
Litigation of, see APPEAL AND ERROR, 7.
In unlawful detainer, see LANDLORD AND TENANT, 6.

COUNCIL:

City council, see MUNICIPAL CORPORATIONS, 6, 7, 10, 16, 17.

COUNTIES:

Statutory satisfaction of judgment, cessation of controversy, see APPEAL AND ERROR, 29.

COURTS:

Prohibition to inferior courts, see PROHIBITION, 1.
Review of the exercise of political or legislative functions, see MUNICIPAL CORPORATIONS, 21.
Review of rulings of land department, see PUBLIC LANDS. 2.
Trial by court without jury, findings, see TRIAL, 9.

1. COURTS—FEDERAL QUESTION—RULE OF DECISION. The rights of husband and wife under the state laws to lands acquired from the United States before final proof, raises a Federal question upon which the decisions of the United States courts control. *Hall v. Hall*.. 186

2. COURTS—FEDERAL QUESTION—RULE OF DECISION. As to what title passes by a patent to a surviving husband and wife under the homestead laws, the decisions of the United States courts are conclusive upon the state courts. *Cunningham v. Krutz*..... 190

CREDITORS:

Of insolvent corporation, see CORPORATIONS, 2-6.
Application for appointment of receiver, see RECEIVERS, 1.
When not entitled to letters of administration, see EXECUTORS AND ADMINISTRATORS, 9.

CREDITORS' SUIT:

See CORPORATIONS, 2-6.

CRIMINAL LAW:

I. INFORMATION AND DEFINITIONS.

1. INFORMATION—SUNDAY—JUDICIAL NOTICE. An information charging the defendant with carrying on the business of barbering on Sunday on a day named, which in fact was Sunday, shows with sufficient certainty that the offense was committed on Sunday, since the court will take judicial notice of the day. *State v. Bergfeldt*..... 234

2. CRIMINAL LAW—OBTAINING PROPERTY UNDER FALSE PRETENSES—INFORMATION—SUFFICIENCY. An information for the offense of obtaining property under false pretenses sufficiently states the essential elements of intent to defraud, the design, and the means by which the fraud was perpetrated, where it is charged that the accused obtained the signature of one B. to a promissory note by means of false representations respecting the organization of a bank at a particular place, that certain parties had subscribed for its stock, that a little ready money was required for a certain purpose, which could be procured on said note, and that a certain banker had sent the accused to said B. for that purpose; since all these statements were representations of material, past, or present facts calculated to deceive said B. and induce him to deliver the note, which was a thing of value although not made to a definite payee (RUDKIN, J., dissenting). *State v. Phelps*..... 470

3. SAME—INFORMATION—SUFFICIENCY—TENDENCY TO DECEIVE. Any pretense which actually deceives the person defrauded is sufficient to sustain a conviction of the crime of obtaining property under false pretenses, it not being essential that it be sufficient to deceive a person of ordinary intelligence. *Id*..... 470

4. CRIMINAL LAW—PLEADING—RAPE—INFORMATION—DUPLICITY. Under Bal. Code, § 7062, defining rape as (1) the carnal knowledge by force of a female over eighteen years of age, and (2) the carnal knowledge of a female child under the age of eighteen years, an information charging the offense by carnally knowing, by force, a female child under the age of eighteen years, states but one offense, since the act constitutes but a single offense whether one or all of the means specified in the statute were employed in its commission. *State v. Adams*..... 552

5. CRIMINAL LAW — ERROR CORAM NOBIS — PETITION — SUFFICIENCY. An application for a writ of *coram nobis* is insufficient where the writ is sought to set aside a conviction of murder because of the commission of perjury of a juror upon his *voir dire*, not discovered until after the decision of the case on appeal, where the petition was not verified by the applicant, nor supported by affidavits; since the

CRIMINAL LAW—CONTINUED.

qualifications of the juror had been adjudicated, and the writ cannot be employed to set aside verdicts on account of perjury. *State v. Armstrong*..... 601

II. EVIDENCE.

6. SAME—CHARGE OF ASSAULT WITH RAZOR—EVIDENCE OF SHOOTING—ADMISSIBILITY. Under an information charging an assault with intent to murder with a deadly weapon, viz., a razor, it is proper to receive in evidence a shotgun with an empty shell found in the room of the accused, where it appears that the prosecuting witness was attacked by an unknown person who cut his throat and shot him in the back with a shotgun, the shot corresponding in size with those that had been contained in the empty shell. *State v. Romano*.. 241

7. SAME—EVIDENCE OF IDENTITY—SUFFICIENCY. There is sufficient evidence of identity to sustain a conviction of assault with intent to do bodily harm, where it appears that the victim was cut and shot by an unidentified person, that the accused admitted to two persons that he made the assault, and a shotgun with an empty shell, that had contained shot of the same size used in the attack, was found in the room of the accused after his arrest. *Id*..... 241

8. CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—EVIDENCE—PROOF OF OTHER CRIMES. Upon a charge of obtaining money upon false pretenses by means of making a collection, upon a day named, falsely representing that the accused was an agent of the prosecuting witness and authorized to collect his accounts, evidence of similar collections from other parties under similar fraudulent pretenses, is inadmissible for the purpose of showing intent, or for any purpose, where there is nothing unusual or extraordinary in the means employed and no connection between the collections made. *State v. Oppenheimer*..... 630

9. SAME—DEFENSES—ADVICE OF ATTORNEY. Upon a prosecution for obtaining money under false pretenses, it is competent for the defendant to prove that he had collected money as agent for the prosecuting witness under the advice of an attorney, believing that he had the right to do so, but only when it appears that the advice was given after a full and fair statement of all the facts, made in good faith. *Id*..... 630

III. TRIAL—INSTRUCTIONS.

10. CRIMINAL LAW—SEPARATE TRIALS—DEMAND—WAIVER. After the jury has been called, it is too late to demand, as a matter of right, separate trials of defendants jointly charged. *State v. Bush*... 13

11. CRIMINAL LAW—PUNISHMENT—THIRD CONVICTION. Under Laws 1903, p. 126, § 3, one who is charged and found guilty of having been twice before convicted of felonies and sentenced therefor, must on the third conviction, be punished by life imprisonment. *Id*.... 13

CRIMINAL LAW—CONTINUED.

12. CRIMINAL LAW—JURORS—MISCONDUCT—NEW TRIAL. It is misconduct entitling the accused in a criminal case to a new trial, for a juror to separate from the body of the jury and go with a bailiff to a public drinking saloon and take a drink of intoxicating liquor, without the knowledge or consent of the judge (RUDKIN and FULLERTON, JJ., dissenting). *State v. Strodemier*..... 159

13. SAME—PRESUMPTION OF PREJUDICE. Where a juror is guilty of such misconduct, it cannot be shown that the same was without prejudice by the fact that he was the last juror to consent to the verdict, since prejudice will be conclusively presumed (RUDKIN and FULLERTON, JJ., dissenting). *Id.*..... 159

14. CRIMINAL LAW — TRIAL — MISCONDUCT OF COUNSEL — CORRECTION. Statements of counsel for the state, on argument to the jury, which were outside of the record, will not constitute prejudicial error entitling the accused to a new trial, where the only statement objected to was in relation to the failure of the defense to produce witnesses at the preliminary examination, and the court upon request, fully and explicitly instructed the jury to disregard this and all statements outside of the record, and no exceptions were taken to the ruling of the court. *State v. Wong Tung Hee*..... 623

15. CRIMINAL LAW—ASSAULT WITH INTENT TO MURDER—PRESUMPTIONS—INSTRUCTIONS. Upon a prosecution for assault with intent to murder under an information charging, also, assault with a deadly weapon with intent to do bodily harm no considerable provocation appearing therefor, it is proper in speaking of the latter intent, to instruct the jury that every sane person is presumed to intend the natural consequences of his voluntary act, although death did not ensue; since the same must be held to apply to the lesser offense only. *State v. Romano*..... 241

IV. APPEAL AND ERROR AND CERTIORARI.

16. APPEAL—RECORD—REVIEW. Error in rulings on motions for a continuance and new trial in a criminal case, or discretionary matters on sentence, cannot be reviewed on appeal in the absence of a bill of exceptions or statement of facts. *State v. Bush*..... 13

17. CRIMINAL LAW—APPEAL—REVIEW—WAIVER OF ERROR. Error cannot be assigned on the failure to appoint counsel for accused upon their arraignment, where they were then informed of their right to counsel and stated that they did not desire any. *Id.*..... 13

18. CRIMINAL LAW—PLEADING—PLEA OF GUILTY INDUCED BY UNFAIR MEANS—INFORMING ACCUSED OF HIS RIGHTS. A judgment and sentence entered upon a plea of guilty should be set aside and leave given to withdraw the plea, where it appears that the same was induced by promises that a light sentence would be given by the court, made by officers and detectives, who refused to permit the ac-

CRIMINAL LAW—CONTINUED.

cused to communicate with his friends or an attorney, and where the accused claims to be innocent and the court did not explicitly inform him, upon arraignment, of his rights as required to do by statute. *State v. Allen*..... 63

CROSS-APPEAL:

Necessity for purposes of urging error, see APPEAL AND ERROR, 12.

DAMAGES:

See NUISANCE, 1-3.
For fraud, see SALES, 4.
On injunction bond, see INJUNCTION, 1, 2.
By change of grade, notice of claim, filing, see MUNICIPAL CORPORATIONS, 1, 2.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 1.
Fires caused by operation of railroad, see RAILROADS, 1, 2.
For defective construction of building, see CONTRACTS, 7-9.
For local improvement, deduction of benefits, see MUNICIPAL CORPORATIONS, 8.
For personal injuries, see MUNICIPAL CORPORATIONS, 35.
In remodeling demised premises, see LANDLORD AND TENANT, 1, 2.
By removal of lateral support, see ADJOINING LANDOWNERS, 1-5.
By seepage of water from upper floor, see LANDLORD AND TENANT, 3.
For vacation of street, see MUNICIPAL CORPORATIONS, 23, 24.
Remitting erroneous item, see APPEAL AND ERROR, 36.

1. DAMAGES—WHEN NOT EXCESSIVE. A verdict for $6,000 for personal injuries to the ankle joint, resulting in the extraction of pieces of bone, a large hole which was a discharging sore up to the time of the trial, and a stiff joint or permanent anchylosis, is not excessive. *Whelan v. Washington Lumber Co*..... 153

2. DAMAGES—FOR PERSONAL INJURIES—EXCESSIVE VERDICT—REMISSION. A verdict of $5,500 for personal injuries sustained by an operator of a turning lathe, a married man forty-seven years of age, and capable of earning $3.50 per day, is excessive, and should be reduced to $3,500, where the only result of the accident was hernia, and testimony of the experts was to the effect that a great majority of people afflicted with this disorder are able to carry on their regular occupations with the aid of trusses, and that a large per cent of such cases are permanently cured by an operation, and where the plaintiff was otherwise in normal health and testified that he had since the injury done some light work. *Leeson v. Saw-Mill Phoenix*..... 423

3. DAMAGES—FOR PERSONAL INJURIES—CAUSE OF PHYSICAL CONDITION—EVIDENCE—QUESTION FOR JURY. A verdict for $2,500 damages for a fall upon a sidewalk is not shown to be excessive where there

DAMAGES—CONTINUED.

was an issue as to whether the accident resulted in curvature of the spine, or whether that was caused by plaintiff's physical condition; and the question is for the jury, where the only expert testified that it could have been caused by the accident, and there was testimony to the effect that prior thereto the plaintiff was a strong healthy woman with no symptoms of any ailments that developed immediately thereafter. *Harris v. Mt. Vernon*..... 444

4. DEATH—DAMAGES—EXCESSIVE VERDICT. A verdict in favor of a widow and three minor children for damages for the death of a husband and father in the sum of $13,500 is excessive and should be reduced to $8,000, where it appears that the deceased was 48 years old, earning $3.50 per day, and had once abandoned his family for a time, and at the time of the accident had left his home, and his wife did not know of his whereabouts nor learn of the death until eleven days thereafter. *Creamer v. Moran Bros. Co*..... 636

5. EVIDENCE — PHYSICIANS SERVICES — PROOF OF VALUE BY AMOUNT PAID—ADMISSIBILITY. In an action for damages for personal injuries, the evidence of the amount paid to a physician for medical attendance is some evidence of the reasonable value of the services, and its admission is therefore not ground for a reversal. *Brown v. Blaine*..... 287

6. SAME—HEALTH PRIOR TO INJURY—EVIDENCE—ADMISSIBILITY. In an action for damages for personal injuries, evidence of the physical condition of the plaintiff prior to the accident is admissible. *Id.* 287

7. DAMAGES—PERMANENT INJURIES—EVIDENCE—MORTUARY TABLES—ADMISSIBILITY. In an action for damages for personal injuries, where there was evidence that the injury was permanent, mortuary tables showing the plaintiff's expectancy of life are admissible. *Id.*... 287

8. DAMAGES—TECHNICAL BREACH—NOMINAL DAMAGES. In an action for the breach of a contract to deliver wood, a finding of a technical breach in that the entire quantity was not delivered supports a judgment for nominal damages only, where there was no finding as to the value of the wood or the damage sustained. *Hotel Co. v. Merchants Ice & Fuel Co*..... 620

DEATH:

Compromise of claim for by attorney, see COMPROMISE AND SETTLEMENT, 1.

Damages for wrongful death, see DAMAGES, 4.

Of insured prior to issuance of policy, see INSURANCE, 4-6.

DECEDENT:

Estates, see EXECUTORS AND ADMINISTRATORS.

Heirs of, as necessary parties to foreclosure, see MORTGAGES, 4.

DECLARATIONS:

Admissibility to establish lost boundary, see BOUNDARIES, 4.

DECREE:

In equity, see EQUITY, 2; SPECIFIC PERFORMANCE, 1.
For relief against void foreclosure, see MORTGAGES, 5.

DEEDS:

Absolute deed as mortgage, see MORTGAGES, 2.
Copy of record, evidence, see RECORDS, 1.
In satisfaction of mortgage, priority over liens, see MORTGAGES 6.
Reformation, see REFORMATION OF INSTRUMENTS, 1.
Tax deeds, see TAXATION, 10.

1. DEEDS — DIFFERENCE IN NAMES — ABBREVIATION — ADMISSIBILITY IN EVIDENCE WITHOUT EXPLANATION. A deed in the chain of title signed by one Chrast and "Fannie" Chrast, certified in the acknowledgment to be his wife, is admissible in evidence as the deed of his wife "Frances" Chrast, without first showing that they were one and the same. *Chrast v. O'Connor*..... 360

2. DEEDS—RECORD—PRIORITY. Under Bal. Code, § 4535, providing that deeds shall be valid as against *bona fide* purchasers from the date of their filing, it is not necessary in case of two deeds from the same grantor, that the subsequent deed to a *bona fide* purchaser be recorded before the first deed is recorded, in order to gain priority, since the statute does not so provide. *Swanstrom v. Washington Trust Co*..... 561

3. RECORDS—DEED FILED BUT NOT INDEXED—PRIORITY. Where a quitclaim deed by a mortgagor was filed for record in the auditor's office several days before the filing of a *lis pendens* in an action to foreclose the mortgage, the finding of the trial court that the quitclaim deed has priority over the *lis pendens* will not be disturbed on appeal, although there was some evidence that the index required by the statute to be kept by the county auditor did not show the quitclaim deed at the time of the filing of the *lis pendens* (DUNBAR, J., dissenting). *Id*..... 524

4. SAME—DELAY IN RECORDING DEED—EFFECT. The neglect of the county auditor to record an instrument for more than twenty days after it has been filed for record cannot militate against the party filing the instrument, if it was properly indexed. *Id*..... 524

DEFAULT:

Appeal from, see APPEAL AND ERROR, 3.
Incorporation of order in judgment, see JUDGMENT, 2.

DEFECT:

In machinery, see MASTER AND SERVANT, 16, 17.
In street or sidewalk, see MUNICIPAL CORPORATIONS, 25-35.

DELAY:

In applying for certiorari, excuse for, see CERTIORARI, 1.

DEPOSIT:

As security, when not payment of note, see BILLS AND NOTES, 5.
Recovery from party receiving, through mistake, see MONEY RECEIVED, 1.

DESCENT AND DISTRIBUTION:

Of lands allotted to Indian, see INDIANS, 1-3.

1. DESCENT AND DISTRIBUTION—COMMUNITY PROPERTY—INTEREST OF WIFE. Upon the death of the husband leaving issue the wife becomes entitled to a three-fourths interest in the community real estate. *Sawyer v. Vermont Loan and Trust Co*..... 524

DESERTION:

Ground for divorce, see DIVORCE, 1.

DIRECTING VERDICT:

In civil actions, see TRIAL, 4, 5.

DISABILITIES:

Effect on limitation, see LIMITATION OF ACTIONS, 5.

DISCHARGE:

From liability as surety, see PRINCIPAL AND SURETY, 1.
Of alleged surety mortgage by changed relations, see MORTGAGES, 3.

DISCOVERY:

Examination of parties concealing assets, see EXECUTORS AND ADMINISTRATORS, 8.

DISCRETION OF COURT:

Abuse, see JUDGMENT, 6.
Appointing successor to administrator, see APPEAL AND ERROR, 32.
Appointment of commissioners to establish lost boundary, see BOUNDARIES, 3.
In setting cause for trial, see TRIAL, 1.

DISEASES:

Aggravation of as element of damages for personal injuries, see MUNICIPAL CORPORATIONS, 35.

DISMISSAL AND NONSUIT:

At trial, see TRIAL, 5-7
Dismissal of appeal, see APPEAL AND ERROR, 15-18, 29-31.
Of injunction, voluntary, action on bond, see INJUNCTION, 1, 2.

DISSOLUTION:

Of partnership, see PARTNERSHIP, 1, 2.
Of injunction, voluntary, action on bond, see INJUNCTION, 1, 2.

DIVORCE:

Effect as to occupant on public domain, see PUBLIC LANDS, 4.

1. DIVORCE—ABANDONMENT—FINDINGS—EVIDENCE. It is error to refuse a divorce on the ground of abandonment, where it appears that the wife left her home without any cause or excuse, and where she later declined absolutely to return home, both upon requests by the husband, by letter, and by her sister, who visited her at her husband's request, and where there was no evidence of collusion. *Lamere v. Lamere*..... 475

DOGS:

Injury from, carried in street car, see CARRIERS, 1.

DOMICILE:

As affecting the joinder of parties in partition, see HUSBAND AND WIFE, 1.

DUE PROCESS OF LAW:

See CONSTITUTIONAL LAW, 1, 2.

DUPLICITY:

Information for rape, see CRIMINAL LAW, 4.

EASEMENTS:

By prescription, see HIGHWAYS, 1.

EJECTMENT:

Notice of suit, see LIS PENDENS, 1.
Supersedeas of money judgment for betterments, see APPEAL AND ERROR, 16.

1. EJECTMENT — DEFENSES — PLEADING — FORGERY OF DEED — PROOF UNDER GENERAL ISSUE. Where title to real property is alleged generally without deraigning the title, the adverse party may show, under the general issue, that a deed forming the chain of title relied upon was a forgery, and it is error to exclude such evidence on the ground that the forgery was not specially pleaded. *Chrast v. O'Connor*. 360

2. EJECTMENT — BONA FIDE OCCUPANTS — ALLOWANCE FOR BETTERMENTS—STATUTES—RETROSPECTIVE EFFECT. Laws, 1903, p. 262, providing that in an action by the owner to recover possession, the *bona fide* occupants of land may offset the value of improvements made in good faith, is not retroactive, and there can be no recovery for improvements made prior to the enactment of said statute. *Barton v. Wickizer*..... 293

EJECTMENT—CONTINUED.

3. BONA FIDE PURCHASER—IMPROVEMENTS—RECOVERY FOR ON FAILURE OF PURCHASE. *Bona fide* purchasers of real estate from an unauthorized agent, who take possession of vacant and unoccupied land in good faith, are entitled to recover the value of improvements if the same were made after the enactment of Laws 1903, p. 262, and not for improvements made prior thereto. *Monk v. Duell*..... 403

ELECTION OF REMEDIES:

Against executor in individual or representative capacity, see EXECUTORS AND ADMINISTRATORS, 1.

Note from one jointly liable for money paid by mistake, see MONEY RECEIVED, 1.

EMINENT DOMAIN:

View by jury, review of verdict, see APPEAL AND ERROR, 40.

1. EMINENT DOMAIN—EVIDENCE OF VALUES—SUFFICIENCY TO SUSTAIN VERDICT—VIEW BY JURY—NEW TRIAL—DISCRETION OF LOWER COURT. The verdict by a jury assessing damages for land appropriated by a city for a street at $300 should not be set aside as contrary to the evidence from the fact that the lowest estimate of the value by any witness on either side was $400, where there was other evidence bearing upon the value, the jury viewed the property, and the trial court refused to set aside the verdict on that ground. *In re East Spring Street*..... 366

EMPLOYEES:

See MASTER AND SERVANT.

ENDOWMENT:

Action to recover under policy, see INSURANCE, 9, 10.

ENTRY:

Of judgment, date, see JUDGMENT, 3.

Of public lands, see PUBLIC LANDS, 1-3.

EQUITY:

See ACCOUNT; INJUNCTION; NUISANCE, 1-3; REFORMATION OF INSTRUMENTS.

Jurisdiction, see SPECIFIC PERFORMANCE, 1.

Actions to redeem, see MORTGAGES, 2, 5.

Equitable rights under lease, see LANDLORD AND TENANT, 5.

1. EQUITY—CLAIM TO EQUITABLE INTEREST IN PURCHASE OF LAND—FRAUD OF PLAINTIFF—RELIEF IN EQUITY. No standing in a court of equity is shown by one who fraudulently misrepresents that he is the owner of coal lands, and after securing an option for $100 for the purchase of the property at $35,000, further fraudulently represents that he has entered into a contract for its purchase at $100,000, upon

EQUITY—CONTINUED.

which $15,000 had been paid, and thereby and by agreeing to organize a corporation and float bonds to reimburse investors for advances, secures advances to the extent of $50,000 which he converts to his own use, and refuses to either purchase the property or pay the taxes; and the persons whom he has defrauded may, to protect themselves, purchase the property independently and for their exclusive benefit, even before the time for his option has expired. *Slater v. Gribbel*..... 168

2. EQUITY—JURISDICTION—RETAINING FOR ALL PURPOSES. Where a court of equity acquires jurisdiction of a cause for one purpose, it retains it for other purposes necessary to a final determination of the whole controversy, if they are germane to, or grow out of the matter, and are not distinct legal rights not affected by the adjudication of the equitable questions: *Lawrence v. Halverson*..... 534

ESCROWS:

Deed in escrow as mortgage, see MORTGAGES, 2.

ESTABLISHMENT:

Of highways, see HIGHWAYS, 1.
Of disputed boundary, see BOUNDARIES, 1-4.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

By judgment, purchasers pending suit, see LIS PENDENS.
Holders of warrants, to seek reassessment, see MUNICIPAL CORPORATIONS, 15.
Of party to ask review of evidence, see APPEAL AND ERROR, 9.
To assert waiver of rights under insurance policy, see INSURANCE, 11.
To claim endowment provision of policy, see INSURANCE, 9, 10.
To deny existence of street by petitioning for vacation, see MUNICIPAL CORPORATIONS, 19.
To question unacknowledged mortgage, see MORTGAGES, 1.
To recover damages by acceptance of building, see CONTRACTS, 7.

EVIDENCE:

Burden of proof, see ACCOUNT, 4; INSURANCE, 1.
Directed verdict or nonsuit, see TRIAL, 4-7.
Newly discovered, as ground for new trial in civil actions, see NEW TRIAL, 3.
Of surprise as ground for new trial, sufficiency, see NEW TRIAL, 2.
Review on appeal, see APPEAL AND ERROR, 23, 32, 34-39, 44.
Weight of, instructions, see TRIAL, 8.

EVIDENCE—CONTINUED.

As to particular facts or issues: Of breach of warranty, see SALES, 1, 2. Building over street line, admissibility of building inspector's approval, see CONTRACT, 9. Certified copy of recorded deed, admissibility, see RECORDS, 1. Of contract for services, sufficiency, see CONTRACTS, 10. Of contributory negligence with respect to fire, see RAILROADS, 1, 2. Extent of business as proof of salary, see CONTRACTS, 11. Of fraud, see SALES, 4; VENDOR AND PURCHASER, 3. Of indemnity, see DEEDS, 1. Of lost corner, see BOUNDARIES, 1, 2, 4. Oral agreement contradicting writing, see BILLS AND NOTES, 3, 4; SALES, 5. Of ownership of capital stock in corporation to show interest, see CONTRACTS, 12. Of part performance, see FRAUDS, STATUTE OF, 1, 2. Of release of claim for death by attorney, see COMPROMISE AND SETTLEMENT, 1. Of similar transaction, admissibility, see COMPROMISE AND SETTLEMENT, 2. Of value of rock taken, necessity to support judgment, see CONTRACTS, 5. Of value of stock, see CORPORATIONS, 7. Of waiver of proofs of loss, see INSURANCE, 8. As to what is newspaper, see TAXATION, 5.

In actions by or against particular classes of parties: See BROKERS, 1. Of damage from vacation of street, see MUNICIPAL CORPORATIONS, 24. Of malpractice, see PHYSICIANS AND SURGEONS, 1. Opinions as to real estate values, see MUNICIPAL CORPORATIONS, 11, 12. Of partnership agreement, see PARTNERSHIP, 2. Record of city council as to vacation of street, see MUNICIPAL CORPORATIONS, 18.

In particular civil actions or proceedings: For abatement of nuisance, see NUISANCE, 1-3. Appointment of receiver, see RECEIVERS, 1-4. Of damages for personal injuries, see DAMAGES, 1-7. Of negligence of cotenant, see LANDLORD AND TENANT, 3. For personal injuries, see MASTER AND SERVANT, 1, 2, 4-7, 27, 28, 33. Of negligence in failing to furnish belt shifters, see MASTER AND SERVANT, 4. For personal injuries through defective street or sidewalk, see MUNICIPAL CORPORATIONS, 25-30. For personal injuries to passengers, see CARRIERS, 2. For recovery of premises demised, see LANDLORD AND TENANT, 4-6. To reform instrument, see REFORMATION OF INSTRUMENTS, 1. Statements of insured as *res gestae*, see INSURANCE, 3. To sustain title, see PARTITION, 1. To sustain assessment of damages for land taken for street, see EMINENT DOMAIN, 1. To sustain claim for equitable rights under a lease, see LANDLORD AND TENANT, 5. To sustain divorce for abandonment, see DIVORCE, 1. To sustain establishment of highway by prescription, see HIGHWAYS, 1.

In criminal prosecutions: Of assault, variance, see CRIMINAL LAW, 6. Of identity, see CRIMINAL LAW, 7. Of other like crimes, see CRIMINAL LAW, 8.

1. EVIDENCE—SPEED OF TRAIN—EXPERTS—OPINION OF A BRAKEMAN FROM CONDITIONS AFTER A WRECK—COMPETENCY. Brakemen or firemen of a few years experience on a logging road are incompetent to

EVIDENCE—CONTINUED.

give expert evidence as to the rate of speed at which a logging train was running, merely from appearances of a wreck, when they were not present and did not see the accident, and their knowledge was not derived from observations of similar wrecks, and when the conditions were abnormal and did not relate to the ordinary operation of trains with which railroad men are presumed to be familiar. *Cook v. Stimson Mill Co*..... 314

EXCEPTIONS, BILL OF:

Necessity for purpose of review in criminal prosecution, see CRIMINAL LAW, 16.

EXCESSIVE DAMAGES:

See DAMAGES, 1-4.

EXECUTION:

Exemptions, see HOMESTEAD.

As means of enforcing judgment against executor, see EXECUTORS AND ADMINISTRATORS, 1.

EXECUTORS AND ADMINISTRATORS:

Appointing successor to administrator, see APPEAL AND ERROR, 32.

Review of order revoking letters, see APPEAL AND ERROR, 22.

1. EXECUTORS AND ADMINISTRATORS—LIABILITY TO THIRD PERSON—ELECTION—JUDGMENT—FORM—ENFORCEMENT. Where executors apply to the use of the estate money or proceeds belonging to a third person, they are liable both in their individual and representative capacity, and the owner having elected to hold them in their representative capacity, the judgment must be in accordance with Bal. Code, §§ 5697, 6239, providing for payment in due course of administration, and not by execution. *Collins v. Denny Clay Co*..... 136

2. EXECUTORS AND ADMINISTRATORS — ASSETS — TITLE — TRUST PROPERTY—EVIDENCE—PRESUMPTIONS. Where it was conceded that stock belonging to the plaintiff was held by a decedent in trust, and came into the hands of the defendants as executors of such decedent's estate, it will be presumed that the ownership continued the same, in the absence of evidence to the contrary. *Id*..... 136

3. EXECUTORS AND ADMINISTRATORS—RESIGNATION—APPOINTMENT OF SUCCESSOR—VALIDITY—COLLATERAL ATTACK. Where an administrator has tendered his resignation and the same has been accepted and a new administrator has been appointed, the last appointment cannot be collaterally attacked by reason of the fact that the first administrator did not render any account. *McKenna v. Cosgrove*..... 332

4. SAME—SALE OF REAL ESTATE TO PAY DEBTS—PETITION—NONEXISTENCE OF PERSONAL PROPERTY—SHOWING—SUFFICIENCY. Although

EXECUTORS AND ADMINISTRATORS—CONTINUED.

the petition for the sale of real estate for the purpose of paying debts of the estate does not state that there was any personal property belonging to the estate, it will be presumed, in aid of the jurisdiction, after the confirmation of the sale, that the court was advised that there was no personal property which could have been applied to the payment of debts, there being no affirmative showing to the contrary. *Id.*..... 332

5. SAME—PETITION—NECESSITY OF SALE. Upon a collateral attack of a sale of real estate for the purpose of paying the debts of the estate, which real estate was specifically devised, it will be presumed in aid of the proceedings that there was no other real estate belonging to the estate, where the petition for the sale states that the lot in question was the only property belonging to the estate, although another lot was included in the inventory; and oral evidence that such other lot belonged to the estate was properly excluded. *Id.* 332

6. EXECUTORS AND ADMINISTRATORS—POWER TO MORTGAGE ESTATE—EXECUTION IN REPRESENTATIVE CAPACITY—PRESUMPTION. An administratrix having authority to mortgage property of the estate under certain conditions, a new mortgage executed by her in her representative capacity will be presumed regular, nothing to the contrary appearing, and the court having known thereof and approved the application of the proceeds of such note and mortgage. *Id.*.... 332

7. SAME—SALE TO PAY DEBTS—CONFIRMATION—REGULARITY—BONA FIDE PURCHASER—COLLATERAL ATTACK. An administrator's sale for the purpose of paying the debts of the estate, confirmed by the court, free from fraud, and shown to be valid on the face of the record, cannot be collaterally attacked for irregularities, as against a *bona fide* purchaser. *Id.*..... 332

8. EXECUTORS AND ADMINISTRATORS — DISCOVERY — EXAMINATION OF PARTY SUSPECTED OF CONCEALING PROPERTY OF ESTATE—PROCEDURE—STATUTE—CONSTRUCTION. Under Bal. Code, §§ 6212, 6213, providing for the citation, and examination under oath, before the court, of persons suspected of having property belonging to an estate, and for their commitment, on failure to answer, the provision that all interrogatories shall be in writing and signed by the party examined does not require that interrogatories be prepared *in toto* before the hearing, but the court may require the matter to proceed summarily by questions reduced to writing and answered in writing in the presence of the court (FULLERTON, J., dissenting). *Main v. Hadfield*.... 504

9. EXECUTORS AND ADMINISTRATORS — LETTERS — ISSUANCE — REVOCATION. A creditor of an estate who agrees with the heirs to wait for his pay until the heirs return from the funeral of the deceased in a distant state, is not entitled to apply for letters of administration until such return, and letters issued to him should be revoked upon application of the heirs. *In re Farnham's Estate*..... 570

EXEMPTIONS:

See HOMESTEAD.

EXPERT TESTIMONY:

As to speed of train from appearance of wreck, see EVIDENCE, 1.
To prove benefits from public improvements, see MUNICIPAL CORPORATIONS, 11, 12.
As to merchantable quality of fruit, see SALES, 2.

FACTORY ACT:

See MASTER AND SERVANT, 1-7, 11-14, 28, 29, 31.

FALSE PRETENSES:

See CRIMINAL LAW, 2, 3, 8, 9.

FALSE REPRESENTATIONS:

As ground for rescission of land contract, see VENDOR AND PURCHASER, 3-6.

FEDERAL COURTS:

When decisions controlling in state courts, see COURTS, 1, 2.

FEES:

Allowance in receivership, see RECEIVERS, 11.

FELONY:

Third offense, conviction, punishment, see CRIMINAL LAW, 11.

FELLOW SERVANTS:

See MASTER AND SERVANT, 9, 10.

FINDINGS:

By court in civil actions, see TRIAL, 9.
Review on appeal, see APPEAL AND ERROR, 40, 41.

FIRE INSURANCE:

See INSURANCE.

FIRES:

Caused by operation of railroad, see RAILROADS, 1, 2.

FISH:

1. FISH—FISH TRAPS—LOCATION—CONFLICT—LATERAL PASSAGEWAY—STATUTORY REGULATION—MEASUREMENTS. Laws 1905, p. 254, § 1, providing that there shall be a lateral passageway of at least 900 feet between fish traps in the Columbia river, requires that every trap shall be so located, that there shall be no other trap within a distance of 900 feet laterally on either side; and in determining this passage way measurements must be made at right angles to the subsequent location as well as to the prior traps. *Johansen v. Mulligan*... 379

FISH—CONTINUED.

2. SAME — SUBSEQUENT LOCATION — INJUNCTION AGAINST OPERATION. Where a fish trap encroaches upon the passageway of prior locations, and it is admitted that it catches fish that would otherwise be caught by the prior traps, the prior locators are entitled to enjoin the maintenance of such trap. *Id*..... 379

FORCIBLE ENTRY AND DETAINER:

See LANDLORD AND TENANT, 6.

FORECLOSURE:

Of mortgage, see MORTGAGES, 4, 5.
Deed in lieu of foreclosure, priority over liens, see MORTGAGES, 6.
Of tax lien, see TAXATION, 1-13.

FORFEITURES:

Of insurance, see INSURANCE, 7.
Of contract for sale of lands, see VENDOR AND PURCHASER, 4.

FORGERY:

As defense in ejectment, pleading, variance, see EJECTMENT, 1.

FRAUD:

See RECEIVERS, 3; SALES, 3.
As affecting estoppel, see INSURANCE, 11.
Of plaintiff, relief in equity, see EQUITY, 1.
Misrepresentation of vendor, see SALES, 4, 5.
Recovery of premiums procured by, see INSURANCE, 9, 10.
To set aside vacation of street, see MUNICIPAL CORPORATIONS, 22.
Sales of realty, see VENDOR AND PURCHASER, 3-6.
Statutes to prevent, title, see STATUTES, 2.

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—ORAL LEASE FOR TERM OF YEARS—PART PERFORMANCE. One who enters into possession of real property, under an oral lease for a term of years is a tenant from period to period in which the rent is reserved, and the tenancy may be terminated by the statutory notice before the end of each such period for which the rent is payable. *Watkins v. Balch*..... 310

2. SAME—PERFORMANCE OF SERVICES AS PAYMENT OF RENT—NECESSITY OF SHOWING VALUE TO TAKE CASE OUT OF STATUTE. An oral lease for the term of five years, in consideration of the services of the tenant in caring for a flock of goats and the performance of labor in clearing the land and making improvements to the value of $100 each year, is within the statute of frauds and creates a tenancy from year to year, unless it is made to appear that the improvements increased the rental value of the premises; and a mere finding that

FRAUDS, STATUTE OF—CONTINUED.

improvements had been made to the extent of $300, is not sufficient to show that the tenants suffer any material injury as to such rental value. *Id*..... 310

FRAUDULENT CONVEYANCES:

Pledge of liquor license, recording assignment, see PLEDGES, 1.

GARNISHMENT:

Appealability, amount in controversy, costs, see APPEAL AND ERROR, 5-7.

Preventing quashing of writ of, see PROHIBITION, 1.

GUARANTY:

See INDEMNITY.

GUARDIAN AND WARD:

Guardianship of insane persons, see INSANE PERSONS, 1-4.

Guardian ad litem, authority to satisfy judgment, see INFANTS, 1.

1. GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—NOTICE OF APPLICATION—JURISDICTION. The court is without jurisdiction to appoint a guardian for an incompetent person unless notice is served upon the person having the care, custody and control of such incontempt, the provision for notice being mandatory. *State ex rel. Lowary v. Superior Court*..... 450

2. SAME—RECORD—NOTICE—ATTENDANCE AT HEARING. The record on the appointment of a guardian for an incompetent person must show that the required notice was given, and that the person was present in court at the hearing or was unable to attend. *Id*..... 450

HARMLESS ERROR:

In admission and exclusion of evidence, see APPEAL AND ERROR, 32, 34-39.

Erroneous finding of the court, see CONTRACTS, 4.

In submitting question to jury, see MASTER AND SERVANT, 29.

HEALTH:

Personal injuries, previous physical condition, see DAMAGES, 6.

HEIRS:

Necessary parties to foreclosure, see MORTGAGES, 4.

Partition against mortgagee in possession, see MORTGAGES, 5.

Rights under agreement of son to support parents, see CONTRACTS, 2.

Of wife, interest in land patented to surviving husband, see PUBLIC LANDS, 5.

HIGHWAYS:

1. HIGHWAYS—PRESCRIPTION—USER—FINDINGS—SUFFICIENCY. In a suit to restrain a trespass, justified on the ground that the *locus in quo* was a public highway, a finding that a road "during the last fourteen years has been traveled by the public generally during all of said time, and known by the people in the vicinity as a public highway" is not sufficient to establish a highway by prescription, in the absence of any showing as to the character of the travel, the nature of the country, the number of people using it, or whether the use was permissive or otherwise. *Rice v. Pershall*..... 73

HOMESTEAD:

Entry on public lands, see PUBLIC LANDS, 4, 5.
Rights of husband and wife, rules of decision, see COURTS, 1, 2.

1. HOMESTEADS—EXECUTIONS—SALE—PRACTICE—OBJECTIONS—EXEMPTION—CONSIDERING AT HEARING ON CONFIRMATION. Upon the sale under execution of real estate of the value of less than $1,000, duly claimed by the judgment debtor as a homestead prior to sale pursuant to the homestead law of 1895, the sale is void unless made under appraisement and in the manner required by such law, and should not be confirmed. *Waldron v. Kineth*..... 459

2. SAME—SALE ON GENERAL EXECUTION—FAILURE TO COMPLY WITH HOMESTEAD ACT—VALIDITY. The question whether real estate sold under execution was at the time exempt as the homestead of the judgment debtor may be heard and determined by the court upon the motion for confirmation of the sale. *Id*..... 459

HUSBAND AND WIFE:

See DIVORCE.
Descent of community real estate, see DESCENT AND DISTRIBUTION, 1.
Rights acquired by patent, rules of decision, see COURTS, 1, 2.

1. HUSBAND AND WIFE—PARTIES—PARTITION—ACTION AS TO WIFE'S REAL ESTATE—NONRESIDENTS—WHAT LAW GOVERNS. Under the laws of the state of New Hampshire, a wife domiciled in that state, and owning an interest in real property in this state, may maintain an action in this state for a partition without joining her husband as party plaintiff. *Sawyer v. Vermont Loan and Trust Co*..... 524

IDENTITY:

In names, burden of proof, see PARTITION, 1.

IMPLICATION:

Repeal of statute by, see STATUTES, 1, 3.

IMPROVEMENTS:

As part performance, see FRAUDS, STATUTE OF, 1, 2.
Credit for on accounting, see ACCOUNT, 1.
Money judgment for, supersedeas, see APPEAL AND ERROR, 16.
Public improvements, see MUNICIPAL CORPORATIONS, 3-16.
Under void entry, effect, see PUBLIC LANDS, 3.
Recovery for in ejectment, see EJECTMENT, 2, 3.

INCOMPETENT PERSONS:

Appointment of guardian, see GUARDIAN AND WARD, 1, 2.

INDEMNITY:

1. INDEMNITY — CONTRACTOR'S BOND — DEFENSES — CONTRACTOR AS AGENT FOR DELIVERY. Where a surety company delivers a bond to a contractor for the purpose of closing a building contract, the contractor is made the agent of the surety for the purpose of delivering the bond, and the surety cannot claim that the bond was not given upon the contract for which it was delivered, if there was nothing on the face of the bond which would tend to put the owner upon inquiry. *Gritman v. United States Fidelity etc. Co*..... 77

INDEPENDENT CONTRACTORS:

As defense, evidence, see MASTER AND SERVANT, 33.

INDIANS:

1. INDIANS—LANDS—RULES OF DESCENT—PATENT. Lands allotted in severalty to an Indian as the head of a family by a patent subject to forfeiture if the lands were abandoned, and restricting the right of alienation for a certain period and until removed by legislative act, descends, upon the death of the allottee without children, as a qualified or base fee (which may become absolute upon removal of the restrictions) to his wife as the only remaining member of the family, under the community property laws of the state, where the customs and rules of descent of the tribe are not shown, such laws not being in conflict with the terms of the patent. *Guyatt v. Kautz*..... 115

2. SAME—DESCENT AND DISTRIBUTION. By the act of Congress of February 8, 1887, making the Puyallup Indians citizens of the United States, the laws of descent in force in the state of Washington became applicable to the Puyallup Indian lands allotted in severalty; and lands inherited by the wife of an original allottee descend upon her death to her daughter as her only heir, in preference to descendents of the sisters of the original allottee. *Id*..... 115

3. SAME—PATENT—TITLE. Under the act of Congress removing the restrictions upon alienation of the lands of the Puyallup Indians, the qualified fee of the Indians ripened into an absolute fee simple title. *Id*..... 115

INDICTMENT AND INFORMATION:

See CRIMINAL LAW, 1-5.

INDORSEMENT:

Of bill of exchange or promissory note, see BILLS AND NOTES, 1, 2.

INFANTS:

Effect of infancy on limitations, see LIMITATION OF ACTIONS, 5.
Satisfaction of judgment by attorney, see ATTORNEY AND CLIENT, 1

1. INFANTS — GUARDIAN AD LITEM — AUTHORITY — SATISFACTION OF JUDGMENT. A guardian *ad litem* appointed to prosecute an action for a minor has power to satisfy the judgment obtained. *State ex rel. Lane v. Ballinger*..... 23

INJUNCTION:

See NUISANCE, 1-3
Against fish-trap, see FISH, 2.
Objections to not raised below, see APPEAL AND ERROR, 10.

1. INJUNCTIONS—ACTION ON BOND—ATTORNEY'S FEES IN PROSECUTING UNSUCCESSFUL ATTEMPT TO DISSOLVE—LIABILITY. Attorney's fees paid in an unsuccessful attempt to dissolve an injunction cannot be recovered in an action upon the injunction bond, where the action of the court in refusing to dissolve the injunction was affirmed on appeal, even though the plaintiff afterwards voluntarily dismissed the injunction. *Thompson v. Benson*..... 70

2. SAME—ADMISSIONS—VOLUNTARY DISMISSAL. The voluntary dismissal of an injunction does not necessarily admit that it was wrongfully sued out. *Id*..... 70

INSANE PERSONS:

1. INSANE PERSONS — GUARDIAN — APPOINTMENT — AFFIDAVIT OF NONRESIDENCE. Under Laws 1903, p. 242, § 1, where a verified petition for the appointment of a guardian of a nonresident insane person states the residence of the ward, there is no necessity of an affidavit of nonresidence. *Coleman v. Cravens*..... 1

2. SAME—NOTICE OF APPLICATION. Under Laws 1903, p. 243, § 5, upon the appointment of a guardian for a nonresident insane person, personal service of notice upon the person having the custody of such person is not required, notice by publication being sufficient. *Id*..... 1

3. SAME—RIGHT TO APPLY. Under Laws 1903, p. 242, an application for the appointment of a guardian for an insane person can be made by any relative or friend. *Id*..... 1

4. SAME—SALE OF PROPERTY—STATUTES—CONSTRUCTION. Laws 1893, p. 85, being general in its nature and covering the entire subject of the estates of nonresident minors and insane persons, repeals by implication Hill's Code, §§ 3071-3078, providing that the guardian

INSANE PERSONS—CONTINUED.

of such persons shall have no power to sell real estate; and consequently, under said act, § 6, and Laws 1893, p. 85, relating to private sales of such estates, a guardian of a nonresident insane person may be empowered by the court to sell the real estate belonging to such persons. *Id*..... 1

INSOLVENCY:

Of corporation, see CORPORATIONS, 2-6; RECEIVERS, 1-4.
Of vendee, rescission of sale, see SALES, 3.

INSPECTION:

By vendee, see SALES, 1, 2, 4.

INSTRUCTIONS:

In civil actions, see TRIAL.
In criminal prosecutions, see CRIMINAL LAW, 14, 15.

INSURANCE:

1. INSURANCE — ACCIDENT POLICY—CONSTRUCTION—EXCEPTIONS—BURDEN OF PROOF. Under the rule that exceptions from liability in accident insurance policies must be construed strongly against the insurance company, the burden of proof is upon the insurance company to establish the fact that an accident happened by reason of some act that was made an exception to the risk, in order to avoid liability, where a death from violent injuries has been shown. *Starr v. Aetna Life Ins. Co*..... 199

2. SAME—POLICY—CONSTRUCTION. Under a provision in a policy of accident insurance exempting the company from liability in case of the death of the insured "being on any railroad bridge or right of way," recovery may be had where the insured, at the side of the tracks, fell or was drawn under the train; since "right of way" must be construed to mean "on the track," and not the full width of the land owned by the company. *Id*..... 199

3. SAME—EVIDENCE—RES GESTAE. In an action upon an accident insurance policy, statements made by the deceased explaining how the accident happened and showing that it was accidental, are admissible as part of the *res gestae*, when made to the physician, about an hour after the accident, in the absence of his associates and when so mangled that an amputation of both arms was necessary and death resulted within thirty-six hours. *Id*..... 199

4. INSURANCE—AGENTS—AUTHORITY. Want of authority of a soliciting agent, who received the first premium on a life insurance policy, to issue a binding receipt constituting a present contract of insurance, must be brought home to the insured in order to relieve the insurance company from liability, the general rules of agency not applying. *Starr v. Mutual Life Ins. Co*..... 228

INSURANCE—CONTINUED.

5. LIFE INSURANCE—BINDING RECEIPT—DEATH PRIOR TO ISSUANCE OF POLICY. Where an insurance solicitor receives the first payment on a life insurance policy and issues a written receipt reciting that the policy (to be thereafter issued) is to take effect from the date of the receipt, there was a present contract of insurance to be superseded by the policy or terminated by rejection of the application, although the application upon a printed form recited that the insurance was not to take effect until the policy was accepted; hence the company would be liable where the application was accepted in ignorance of an intervening accident which resulted in death before the delivery of the policy. *Id.* 228

6. INSURANCE—RECEIPT AND APPLICATION—CONFLICT—CONSTRUCTION. Where an application for insurance upon a printed form conflicts with the statements of a written receipt, the latter controls. *Id.* 228

7. INSURANCE — LOSS BY FIRE — POLICY — CLAUSE FOR SUBROGATION AGAINST PARTY CAUSING FIRE—RELEASE BY INSURED AS BREACH OF SUBROGATION CLAUSE. Where a clause in a fire insurance policy provides that the insurer shall be subrogated to the rights of the insured against any person whose act or neglect caused the fire, and after the issuance of the policy the insured entered into a contract with a railroad company releasing it from all liability for fires caused by it, there can be no recovery upon the policy for a loss by a fire cause by sparks from a passing engine of said railroad company. *Downs Farmers Warehouse Ass'n v. Pioneer Mutual Ins. Ass'n.*. 372

8. INSURANCE—LOSS BY FIRE—PROOFS OF LOSS—WAIVER—EVIDENCE—SUFFICIENCY. A fire insurance company waives sworn proofs of loss called for by the policy, where immediately after the fire the insured notified the officers of the company of the loss and inquired what was necessary to be done in order to have the loss adjusted, and followed out instructions given to secure invoices, and subsequently the company refused to pay anything on the loss without giving any reason therefor; since there was an evident intent to mislead the insured by the giving of incorrect instructions. *Sidebotham v. Merchants Fire Association*..... 436

9. INSURANCE—ENDOWMENT PROVISION—WAIVER—PAYMENT OF PREMIUMS AFTER MATURITY—FRAUD—EVIDENCE—SUFFICIENCY. There is no waiver of a clause in an insurance policy allowing the insured to receive an endowment of $1,000 after the lapse of ten years, nor any estoppel on the part of the insured to claim the benefit of such clause, in lieu of continuing the policy for life by payments, where it appears that the insured were old people, inexperienced in business, and upon demanding the endowment they were put off from time to time on the ground that assessments provided for in the policy for such payment must be made, and where, relying upon fraudulent representations that payments must be continued by them to keep

INSURANCE—CONTINUED.

the policy in force, they made such payments; since waiver requires full knowledge of one's rights, and the intent must be unequivocal and clearly proven. *Hopkins v. Northwestern Nat. Life Ins. Co.* 592

10. SAME—RECOVERY OF PREMIUMS ERRONEOUSLY PAID. Payment of premiums on an insurance policy, induced by fraudulent representations by the company, while the insured were making demand for the right to an endowment, will not amount to a waiver of such right; and the payments may be recovered, even if negligently made. *Id.* 592

11. SAME—FRAUD—ESTOPPEL TO ASSERT WAIVER. An insurance company that fraudulently induces payment of premiums ordinarily amounting to a waiver of a clause for the payment of an endowment, is estopped to assert such waiver or to claim that the insured had elected not to take advantage of the endowment clause. *Id.*... 592

INTENT:

Criminal, see CRIMINAL LAW, 15.

INTOXICATING LIQUORS:

Recording assignment of license, see PLEDGES, 1.

1. INTOXICATING LIQUORS—LICENSE—ASSIGNABLE AS PROPERTY. An unexpired municipal license to sell liquor for the term of one year, paid for in advance, and which may be transferred by consent of the city upon the observance of certain formalities, is property that is assignable, and passes upon the insolvency of the licensee to a receiver for the benefit of creditors. *Degginger v. Seattle Brewing and Malting Co.* 385

IRRIGATION:

See WATERS.

Lien for assessments, priority, see MORTGAGES, 6.

JUDGES:

See JUSTICES OF THE PEACE.

Place of certification of statement, see APPEAL AND ERROR, 20.

JUDGMENT:

Duration, see LIMITATION OF ACTIONS, 4.

Review, see APPEAL AND ERROR.

Of default, appeal from, see APPEAL AND ERROR, 3.

For foreclosure of tax lien, see TAXATION, 9.

Against municipality, satisfaction for issuance of warrant, see APPEAL AND ERROR, 29, 30.

Authority of attorney or guardian *ad litem* to satisfy, see ATTORNEY AND CLIENT, 1; INFANTS, 1.

JUDGMENT—CONTINUED.

Form, against executor in representative capacity, see EXECUTORS AND ADMINISTRATORS, 1.

In unlawful detainer, see LANDLORD AND TENANT, 6.

Modification *nunc pro tunc*, parties aggrieved, see APPEAL AND ERROR, 13,14.

To redeem from foreclosure, see MORTGAGES, 5.

For rescission of contract of sale, see SALES, 3.

Specific performance of partnership agreement, see SPECIFIC PERFORMANCE, 1.

1. JUDGMENT—RELIEF CONDITIONAL ON PAYMENT—WHEN TO BE MADE COMPULSORY. Where, in an action between partners, it is found that the plaintiff is entitled to a half interest in certain premises, upon payment to the defendant of a balance due, it is error to enter a decree to that effect, without compelling prompt payment, allowing the plaintiff to speculate in the value of the property, and the decree will be made compulsory within thirty days, with execution for the amount at the end of such time. *Lawrence v. Halverson*..... 534

2. JUDGMENT — DEFAULT — INCORPORATION IN JUDGMENT. It is not necessary upon taking judgment by default to enter the default in a separate order. *Warner v. Miner*..... 98

3. SAME—DATE—CLERICAL ERROR. A clerical error of the county clerk in recording a judgment by filling up a blank for the date six days later than the filing date is immaterial, as the date of the judgment was the date of its filing. *Id*..... 98

4. JUDGMENT—PARTIES BOUND—SURPLUSAGE. Parties cannot object that a judgment regular as to them is void because also against their assigns, who are not bound thereby, since that may be treated as surplusage. *Collins v. Denny Clay Co*..... 136

5. JUDGMENTS—VACATION OF DEFAULT—NEGLECT OF AGENT—SUFFICIENCY. Nonresident owners of property sold for taxes do not show sufficient ground for vacating the judgment by showing that their agent, a resident of the state, who held the fee and owned an equitable interest in the land, and who had paid the taxes up to a certain time, promised to pay the taxes but had failed to do so. *Warner v. Miner*..... 98

6. JUDGMENT—VACATION—EXCUSABLE NEGLECT. It is an abuse of discretion for the trial court to grant a motion for default and deny an application to vacate the same, where it appears that the defendant's counsel, whose residence was 200 miles from the place of trial, served by mail a motion to make the complaint more definite and certain, submitting the same with a written argument, and relied upon the opposing counsel to give notice of the disposition of the same, not knowing when the same would be heard, which notice was not given; and upon motion for default being made eleven days after the disposition of the defendant's motion, the defendant's coun-

JUDGMENT—CONTINUED.

sel presented an affidavit of meritorious defense and tendered an answer, and leave to file the same was denied; since the facts present a case of excusable neglect in not being represented at the hearing and answering in time, calling for a denial of the default upon terms (FULLERTON, RUDKIN, and DUNBAR, JJ., dissenting). *Douglas v. Badger State Mine*..... 266

7. JUDGMENTS — AGAINST MUNICIPALITY — SATISFACTION—STATUTES—CONSTRUCTION. Bal. Code, § 5676, prescribing the method of satisfying judgments against a municipality, and providing for the issuance of an order for the amount of the judgment "in favor of the party for whom the same was given" does not require that the order be made to the judgment creditor; but, construed in connection with Bal. Code, § 5676, providing that the attorney may receive payment and satisfy the judgment, authorizes the issuance of an order to the attorney of the party, and the same operates to discharge the judgment. *State ex rel. Lane v. Ballinger*..... 23

JUDICIAL NOTICE:

Of Sunday, see CRIMINAL LAW, 1.

JUDICIAL SALES:

Of property of decedent, see EXECUTORS AND ADMINISTRATORS, 4, 5, 7.

JURISDICTION:

Amount in controversy, see APPEAL AND ERROR, 4-7.

Appointment of guardian, see GUARDIAN AND WARD, 1, 2.

Of appeal depending upon validity of tax or statute, see APPEAL AND ERROR, 4, 33.

Of appeal, sufficiency of bond, see APPEAL AND ERROR, 15-17.

In equity, retaining for all purposes, see EQUITY, 2; SPECIFIC PERFORMANCE, 1.

Presumptions in aid of executor's sale, see EXECUTORS AND ADMINISTRATORS, 4, 5.

JURY:

Assessment of damages in condemnation proceedings, see EMINENT DOMAIN, 1.

Counsel stating law to, see TRIAL, 2.

Instructions in civil actions, see TRIAL.

Instructions in criminal prosecutions, see CRIMINAL LAW, 14, 15.

Misconduct of juror as ground for new trial, see CRIMINAL LAW, 12, 13; NEW TRIAL, 1.

Perjury on *voir dire* as ground for writ of *coram nobis*, see CRIMINAL LAW, 5.

Separation of, see CRIMINAL LAW, 12.

Question for, see MASTER AND SERVANT, 1, 3, 4, 6, 7, 17-21, 23, 25.

View by, review of verdict, see APPEAL AND ERROR, 40; EMINENT DOMAIN, 1.

JUSTICES OF THE PEACE:

1. JUSTICES OF THE PEACE—COMPENSATION—ELECTED IN CITY OF LESS THAN 5000 INHABITANTS—GROWTH OF CITY TO SUCH POPULATION—EFFECT—STATUTE—CONSTRUCTION. Laws 1897 p. 110, providing that after the election to be held in November, 1898, there shall be but one justice of the peace in cities having more than five thousand inhabitants, whose salary shall be $1,200 per annum, supersedes the act of 1891, providing a salary for all justices in such cities; and hence no salary is fixed for tne justices in a city of less than five thousand inhabitants, during the time after such city acquires more than five thousand inhabitants, until one of them is duly elected at a biennial election a justice of a city of that size (RUDKIN, J., dissenting). *Ogden v. Chehalis County*..... 45

KNOWLEDGE:

As affecting contributory negligence of servant, see MASTER AND SERVANT, 25, 32.

Of other like accidents as evidence of negligence, see MASTER AND SERVANT, 27.

LABOR:

On Sunday, see CONSTITUTIONAL LAW, 1.

Eight hour day, see CONSTITUTIONAL LAW, 4.

Claim for services against receivership, see RECEIVERS, 9, 10.

LANDLORD AND TENANT:

Action by tenant to abate nuisance, see NUISANCE, 1-3.

Measure of damages to leased buildings by removal of lateral support, see ADJOINING LANDOWNERS, 4, 5.

Liability for repairs, see ADJOINING LANDOWNERS, 5.

Liability for negligence of contractor in remodeling building, see APPEAL AND ERROR, 40.

Oral lease for term of years, termination, see FRAUDS, STATUTE OF, 1, 2.

1. LANDLORD AND TENANT—REMODELING BUILDING—NEGLIGENCE. A landlord is liable to his tenant for damage caused by the negligence of contractors in remodeling the building, whether they are principal contractors, employed by the landlord, or subcontractors. *Bancroft v. Godwin*..... 253

2. LANDLORD AND TENANT—DAMAGE TO GOODS OF LESSEE BY SUB-CONTRACTOR—LIABILITY OF PRINCIPAL CONTRACTOR. A contractor for the remodeling of a building under a contract with the landlord is not liable to a tenant for damages to his goods sustained through the negligence of a subcontractor. *Id*..... 253

3. NEGLIGENCE—OF COTENANTS IN BUILDING—FLOWAGE OF WATER—EVIDENCE—SUFFICIENCY. There is sufficient evidence that leakage or seepage causing damage to a defendant on the ground floor of a

LANDLORD AND TENANT—CONTINUED.

building was due to the negligence of the occupant of the second story used for the purpose of a restaurant, and was not merely accidental, where there was evidence that water would come down several times a week and sometimes every day for a week or so, and officers of the defendant admitted that many complaints were made continually for two years and that they had the plumber up to fix the pipes, and that something was wrong all the time. *Sheehan & Co. v. Maison Barberis*..... 671

4. LANDLORD AND TENANT—LEASES—FOR TERM OF YEARS, WITHOUT ACKNOWLEDGEMENT—TERMINATION. An unacknowledged lease for a term of years, with yearly rent reserved, is terminable upon thirty days notice preceding the end of the period at which the rent was payable, under Bal. Code, § 4568, providing that unacknowledged leases are valid for a period not exceeding one year, and under Bal. Code, § 4569, providing that premises leased for an indefinite term with periodic rent reserved shall be construed to be a tenancy from period to period. *Dorman v. Plowman*..... 477

5. SAME—EQUITIES OF TENANT—CONSIDERATION FOR LEASE. A tenant under an unacknowledged lease cannot claim any equitable rights from the fact of a purchase of cattle from the landlord where the purchase formed no part of the consideration for the lease. *Id.*. 477

6. UNLAWFUL DETAINER—EXPIRATION OF LEASE BEFORE FINAL TRIAL—RIGHT OF DEFENDANT TO JUDGMENT FOR COSTS. Upon a finding in favor of the defendant in an action of forcible entry and detainer, in which the final trial does not occur until after the expiration of the defendant's lease, judgment that the defendant was rightfully in possession at the time of the commencement of the action, and that he recover his costs, is proper. *Teater v. King*..... 134

LAND OFFICE:

Employee as entryman, rulings of department, review, see PUBLIC LANDS, 1, 2.

LANDS:

See PUBLIC LANDS.

Indian lands, descent, see INDIANS, 1-3.

LATERAL SUPPORT:

Removal, damages, see ADJOINING LANDOWNERS, 1-5.

LAW OF THE CASE:

See APPEAL AND ERROR, 44-46.

LEASES:

For term of years, unacknowledged, termination, see FRAUDS, STATUTE OF, 1, 2; LANDLORD AND TENANT, 4, 5.

LEGISLATIVE POWER:

See MUNICIPAL CORPORATIONS, 21.
Delegation of, see CONSTITUTIONAL LAW, 5, 6.

LICENSES:

Recording assignment of, see PLEDGES, 1.
For sale of intoxicating liquors, assignability, see INTOXICATING LIQUORS, 1.

LIENS:

Assessments for irrigation, see MORTGAGES, 6; WATERS, 1.
For local improvement assessment, see MUNICIPAL CORPORATIONS, 5½.
Tax lien, see TAXATION, 1-13.

LIFE INSURANCE:

See INSURANCE.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION.
To enforce stockholder's liability for corporate debts, see CORPORATIONS, 2-6.
Failure to present claim against city within time, excuse, see MUNICIPAL CORPORATIONS, 1, 2, 27.
Of time for certiorari, see CERTIORARI, 1.

1. LIMITATION OF ACTIONS—PARTITION—TITLE WITHIN TEN YEARS. An action for the partition of real estate cannot be maintained where it appears that neither plaintiff nor his ancestor, predecessor or grantor, was seized or possessed of the premises at any time within ten years prior to the commencement of the action. *Hyde v. Britton*..... 277

2. LIMITATION OF ACTIONS—CONTRIBUTION OF CO-SURETY—IMPLIED LIABILITY—WRITTEN AGREEMENT. An action for contribution between co-sureties upon a promissory note is upon an implied liability arising out of an express contract, and is controlled by Bal. Code, § 4798, prescribing a limitation of six years for the commencement thereof. *Caldwell v. Hurley*..... 296

3. LIMITATION OF ACTIONS—ABSENCE FROM STATE TOLLING STATUTE—APPLICABILITY TO NONRESIDENTS. Bal. Code, § 4808, with reference to the tolling of the statute of limitations during the absence of the debtor until his "return" to this state, applies to nonresident debtors who never at any time resided in this state. *Omaha National Bank v. Lindsay*..... 531

4. SAME — JUDGMENT IN ACTION BETWEEN NONRESIDENTS — WHERE CAUSE AROSE. A judgment entered in the courts of this state in favor of a resident of Nebraska against residents of Idaho upon acceptance of personal service, creates a liability which "arose" in this

LIMITATION OF ACTIONS—CONTINUED.

state, within the meaning of the statute of limitations, Bal. Code, § 4818, and the period for the commencement of an action thereon does not begin to run until the judgment debtors remove to this state (FULLERTON and CROW, JJ., dissenting). *Id.*..... 531

5. LIMITATION OF ACTIONS—BY MINOR TO RECOVER REAL PROPERTY—STATUTE—WHEN BEGINS TO RUN. Under Bal. Code, § 4809, the time during which the owner of land is a minor is not a part of the time limited by Bal. Code, §§ 4796, 4797, requiring actions for the possession of land to be commenced within ten years; and an action commenced within four years after the minor attains his majority is within time. *May v. Sutherlin*..... 609

LIS PENDENS:

Notice of action to recover possession of real estate, see ADVERSE POSSESSION, 3.

Priority over deed, recording, see DEEDS, 3.

1. LIS PENDENS—ACTION TO RECOVER POSSESSION OF REAL ESTATE. Notice of the pendency of an action to recover the possession of real estate is not necessary under Bal. Code, §§ 5515, 5518, providing that such actions shall not be affected by alienation *pendente lite*, and that judgment as to the right of possession shall be conclusive on the parties, and those claiming under them after the commencement of the action, which sections are not superseded or controlled by the general statute, Bal. Code, § 4887, providing for the filing of notice of *lis pendens* in certain forms of actions. *May v. Sutherlin*..... 609

LOCATION:

Of fish traps, see FISH, 1, 2.

LOGS AND LOGGING:

Danger from falling limbs, see MASTER AND SERVANT, 15.

MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT.

MAINTENANCE:

Contract for, see CONTRACTS, 1-3.

MALPRACTICE:

See PHYSICIANS AND SURGEONS.

MANDAMUS:

To compel incorporation of testimony in statement, see APPEAL AND ERROR, 25.

To compel reassessment, process, see MUNICIPAL CORPORATIONS, 16, 17.

MANDAMUS—CONTINUED.

1. MANDAMUS—TO ENFORCE PRIVATE CONTRACT OF IRRIGATION COMPANY TO DELIVER WATER—ADEQUATE REMEDY AT LAW. Mandamus does not lie to compel an irrigation company to deliver water to a land owner pursuant to a private contract for water to irrigate the plaintiff's lands, since there is an adequate remedy at law in an action for damages. *State ex rel. Krutz v. Washington Irr. Co.* 283

2. MANDAMUS—PARTIES—PROSECUTION IN NAME OF STATE. An application for a writ of mandate in the interest of a private party is properly made in the name of the state. *State ex rel. Richardson v. Superior Court*..... 439

MASTER AND SERVANT:

Compromise of death claim by attorney, see COMPROMISE AND SETTLEMENT, 1.

Personal injuries, excessive damages, see DAMAGES, 1, 2, 4.

1. MASTER AND SERVANT—NEGLIGENCE—INJURY TO MINER BY FALL OF ROCK—FURNISHING PROPS—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by a miner from the alleged fall of rock in a mine, the question of the negligence of the defendant is for the jury, where there was evidence that no props were furnished to the plaintiff, as required by statute, although he had demanded the same; and the defendant is not entitled to a nonsuit by reason of conflicting testimony to the effect that there were sufficient props provided, and that the plaintiff had stated at the time that his injury was due to other causes. *Druglis v. Northwestern Imp. Co*..... 398

2. MASTER AND SERVANT — NEGLIGENCE — DANGEROUS MACHINERY — LAUNDRY MANGLE — GUARD — SUFFICIENCY — UNEXPECTED DANGERS. There is not sufficient evidence of failure to provide a proper guard for a mangle, or to support a verdict for injuries received by the operator, where it appears from the testimony of the plaintiff that the machine had a guard, and the defendant had made a *bona fide* attempt to comply with the factory act, that the plaintiff's hand became entangled in apron strings and was forcibly drawn over the top of the guard, and that such an accident was a most unusual occurrence, and was not anticipated by the plaintiff, an experienced operator, and could not have been reasonably anticipated by the defendant. *Daffron v. Majestic Laundry Co*..... 65

3. SAME—BELT SHIFTERS—WHEN NECESSARY. The factory act requiring the use of "proper belt shifters or other mechanical contrivances for the purpose of throwing on or off belts on pulleys," was not intended to require shifters only in proper or necessary places, but requires "sufficient" belt shifters in all cases; and it could rarely if ever be left to the jury to say whether any belt shifter or other device was necessary in a given case. *Whelan v. Washington Lumber Co*..... 153

MASTER AND SERVANT—CONTINUED.

4. SAME—SUBMISSION OF QUESTION TO JURY. Where there is conflicting evidence upon an issue as to whether shifting devices for the throwing on or off of belts could have been effectively maintained, and the jury find the issue in favor of the plaintiff, under instructions submitting such issue, the defendant cannot claim that the plaintiff assumed the risk from the fact that the shifters were unnecessary and the factory act not violated. *Id.*..... 153

5. SAME—VIOLATION OF FACTORY ACT—QUESTION OF LAW. There is a violation of the factory act, as a matter of law, where couplings on a revolving shaft about two and one-half feet above the ground, in a blacksmith shop, are wholly exposed and unguarded at a place where men are required to work. *Hoveland v. Hall Bros. Marine R. etc. Co*..... 164

6. SAME—POSSIBILITY OF GUARDING SAW—QUESTION FOR JURY. It is for the jury to determine whether a saw could have been properly guarded where witnesses testified that a proper guard could have been placed over or at the side of the saw at slight expense without any inconvenience or detriment to the operation of the saw, although this was disputed by other witnesses. *Erickson v. McNeeley & Co*..... 509

7. MASTER AND SERVANT—NEGLIGENCE—UNGUARDED CHIPPER—ASSUMPTION OF RISK—QUESTION FOR JURY. Upon a conflict in the testimony as to whether a saw, used for the purpose of chipping off the top part of the larger logs, could be advantageously guarded, under the factory act, the question is one of fact for the jury and not of law for the court, where there was ample testimony, if believed, to establish the fact that it could be guarded. *Rector v. Bryant Lumber etc. Co*..... 556

8. SAME—PROXIMATE CAUSE OF INJURY—FINDING OF JURY. Where an employee slipped and stumbled while attempting to reach over an unguarded coupling on a revolving shaft, and the jury were instructed that the plaintiff could not recover if the accident would not have happened but for the condition of the ground, if known to the plaintiff, a finding for the plaintiff determines that the condition of the ground was not the proximate cause of the accident. *Hoveland v. Hall Bros. Marine R. etc. Co*..... 164

9. SAME — PROXIMATE CAUSE — EXPOSED CONDITION OF COGWHEELS A CONTRIBUTING ELEMENT—LIABILITY OF MASTER. The maintenance of a planer with exposed cogs which could have been easily covered, and with defects whereby the cogs were likely to start automatically upon application of the idler, is the proximate cause of an injury to a planer-man who was injured thereby, while cleaning out under the machine, although the negligence of a fellow servant, who started the machine without giving any warning, contributed to the result; and such contributory cause does not relieve the defendant from liability. *Williams v. Ballard Lumber Co*..... 338

MASTER AND SERVANT—CONTINUED.

10. SAME — VICE PRINCIPALS — SUPERINTENDENT — SETTING DANGEROUS AGENCY IN OPERATION. Where a number of men were engaged in removing the propeller from a ship, the shaft of which was tightly wedged in the hub, the act of the superintendent in striking the hub a blow with a sledge, without warning the men in close proximity thereto, thereby releasing a quantity of hot oil confined in the hub, and precipitating the same upon one of the men, is the act of a vice principal and not of a fellow servant, in that it put in operation an agency fraught with danger, without warning to the men. *Creamer v. Moran Bros. Co*..... 636

11. MASTER AND SERVANT—NEGLIGENCE—FACTORY ACT—ASSUMPTION OF RISK. The defense of the assumption of risks from an unguarded shaft coupling cannot be raised where the defendant has violated the factory act requiring the coupling to be guarded. *Hoveland v. Hall Bros. Marine R. etc. Co*..... 164

12. MASTER AND SERVANT—NEGLIGENCE—FACTORY ACT—ASSUMPTION OF RISK. Under Laws 1903, p. 40, requiring factory and mill owners to use proper belt shifters, failing to do so is negligence *per se*, and where this is not done, an employee assisting in removing a belt does not assume the risk of injury therefrom. *Whelan v. Washington Lumber Co*..... 153

13. SAME—VIOLATION OF STATUTORY DUTY—ASSUMPTION OF RISK. An employee in a mine does not assume the risks of injury by reason of defendant's failure to perform the statutory duty of furnishing sufficient props. *Druglis v. Northwestern Imp. Co*..... 398

14. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISK—UNGUARDED SAW. Under the provisions of the factory act, an employee does not assume the risk of injury from an unguarded saw, if it could have been properly guarded, in which case the master is guilty of negligence as a matter of law. *Erickson v. McNeeley & Co*.. 509

15. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS. There are no abnormal risks in the danger from falling limbs in the work of falling trees which call for instructions thereon, but the risks are open and apparent and assumed by an adult employee of ordinary intelligence who had been engaged in the work for a week, although he had had no previous experience with a tree of the same size. *Anderson v. Columbia Imp. Co*..... 83

16. MASTER AND SERVANT—NEGLIGENCE—INJURY TO SERVANT FROM DEFECTIVE LATHE — ASSUMPTION OF RISKS — PROMISE TO REPAIR — LIABILITY OF MASTER. An operator of a turning lathe is, by the master's promise to repair, relieved from the assumption of risks by reason of a broken socket, where it appears that the superintendent told him to take the socket to the office and it would be repaired, which he did several times, but returned with it and used it unrepaired upon an urgent request of the foreman, upon his promise to repair it as

MASTER AND SERVANT—CONTINUED.

soon as the job was completed, and where the danger was not so imminent that a workman of ordinary prudence would have regarded it so hazardous as to have refused. *Leeson v. Saw-Mill Phoenix*. 423

17. SAME—ASSUMPTION OF RISKS—UNKNOWN DANGERS—DEFECTS IN MACHINE CAUSING UNEXPECTED STARTING—QUESTION FOR JURY. A planer-man who has worked upon a planer but five days and has no knowledge of a defect whereby the cogs may start automatically upon the application of the idler, does not assume the risk from injury resulting from the known unguarded condition of the cogs, where there was ample time for him to have avoided the injury if the cogs had not automatically started. *Williams v. Ballard Lumber Co*. 338

18. MASTER AND SERVANT—NEGLIGENCE—HOT OIL FROM MACHINERY—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—WHEN QUESTIONS FOR JURY. The defenses of assumed risk and contributory negligence are for the jury where the evidence shows that the plaintiffs' decedent was injured while assisting to remove a propeller from a ship, the hub having become tightly fastened to the shaft, the proximate cause being the negligence of the defendant in failing to inspect the hub and learn of a large amount of hot oil therein, together with the act of the superintendent, who struck the hub with a sledge in such a manner as to release the oil, which fell upon plaintiffs' decedent, who was standing with his back to the shaft and who had no knowledge of the presence of the oil, nor that the superintendent was about to strike the hub. *Creamer v. Moran Bros. Co*..... 636

19. MASTER AND SERVANT—NEGLIGENCE—INJURY TO EMPLOYEE CAUGHT IN COGWHEELS — CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY. A planer-man who is in a kneeling position with head and shoulders under a planer, a large and dangerous machine, is not guilty of contributory negligence, as a matter of law in suddenly throwing his hand into unguarded cogs, known to him, in an effort to get from under the machine, in momentary forgetfulness of the danger, when a fellow servant starts the machine in motion without giving him any warning. *Williams v. Ballard Lumber Co*..... 338

20. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE. Contributory negligence is a question for the jury if men might properly differ as to whether the plaintiff had acted as a man of ordinary prudence would have done under the same circumstances. *Id*..... 338

21. MASTER AND SERVANT—UNPROTECTED COGWHEELS—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—WHEN QUESTION FOR JURY. The question of the contributory negligence of the plaintiff is for the jury where it appears that he was engaged as a common laborer to bear away lumber from an edger, that he was requested to take the place of another controlling the live rolls, that he expressed doubt as to his ability to do so, and was injured in attempting to replace a

MASTER AND SERVANT—CONTINUED.

stick, which was about to fall from the rolls, and which lay over an unguarded cogwheel which he did not see and which caught his hand. *Hansen v. Seattle Lumber Co*..... 349

22. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—INJURY TO EMPLOYEE DUMPING LOAD OF WOOD—COMPLAINT—SUFFICIENCY. The complaint in an action for personal injuries sustained by a teamster in the defendant's employ is insufficient, in that it shows that the plaintiff was guilty of contributory negligence which proximately caused the injury, where it appears therefrom that in using a dumping device on a wagon, known by him to be out of repair, and from which it was difficult to remove the wrench used in dumping the load, the plaintiff unnecessarily assumed a position where he would be struck by the wrench in case he was unsuccessful in removing it. *Trudeau v. American Mill Co*..... 465

23. SAME—WORKING WITH BACK TO SAW—CONTRIBUTORY NEGLIGENCE. A power bolter's helper whose duty it is to place shingle blocks on the saw carriage, is not guilty of contributory negligence as a matter of law, by reason of his turning his back to the saw, striking his hook into a block weighing 75 to 100 pounds, and pulling with sufficient force to pull out the hook and fall backward into the saw, where there was evidence to the effect that the working space was filled up with blocks, that it was the customary way of placing blocks on the carriage, and necessary to have his back to the saw under the circumstances. *Erickson v. McNeeley & Co*..... 509

24. MASTER AND SERVANT—COLLISION OF FURNITURE VANS—CONTRIBUTORY NEGLIGENCE. The driver of a one-horse delivery wagon, injured in a collision with a heavy furniture van, which was backing up to the curb, is guilty of contributory negligence precluding a recovery, where it appears that he was, in the day time, driving along a wide street free from other obstructions, with his horse under control, and undertook, without reason or excuse, to drive between the curb and the large van, when as a careful driver he should have known that he could not do so, and when he might have stopped or passed in front. *Roe v. Standard Furniture Co*..... 546

25. SAME—KNOWLEDGE OF DANGER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Whether a sawyer, who was injured in giving a signal by throwing up his hand, coming in contact with the revolving knives of a chipper over the sawyer's pit, is guilty of contributory negligence, is a question for the jury, where it appears that the distance from the floor to the chipper was seven or eight feet, that ten inches of sawdust had accumulated in the floor of the pit, but the foreman did not have the same removed when it was called to his attention at the noon-hour, and where the other methods of giving the signal were by a rope of which the plaintiff had no knowledge, or by leaving his position and going around the end of the log; since

MASTER AND SERVANT—CONTINUED.

a person is not guilty of contributory negligence as a matter of law simply because he had previous knowledge of the danger. *Rector v. Bryant Lumber etc. Co*..... 556

26. SAME—CONTRIBUTORY NEGLIGENCE. Where a workman comes in contact with unguarded machinery which he is not operating, the rule as to his contributory negligence is different from the rule where the machinery is under his immediate control. *Id*..... 556

27. EVIDENCE — PRIOR ACCIDENTS ON SAME AND OTHER COGWHEELS — ADMISSIBILITY. Upon an issue as to whether the defendant knew of the exposed and dangerous condition of cogwheels upon which its servant was injured, evidence is admissible of other accidents happening upon the same cogwheels, and others similarly situated in the same mill, prior to the time of the plaintiff's injury, and that defendant knew thereof. *Hansen v. Seattle Lumber Co*..... 349

28. EVIDENCE—PROOF OF GUARDING SAW AFTER ACCIDENT—WHEN ADMISSIBLE. Upon an issue as to whether a saw could have been advantageously guarded under the factory act, it is not error to admit evidence that after the accident it was guarded, where the evidence was offered only for the purpose of showing that the saw could have been guarded, and the jury were instructed to consider it only for that purpose. *Erickson v. McNeeley & Co*..... 509

29. APPEAL AND ERROR—REVIEW—HARMLESS ERROR. Where the failure to provide a guard for a coupling is, as a matter of law, a violation of the factory act, the defendant cannot complain of instructions submitting to a jury the question of the necessity of a guard. *Hoveland v. Hall Bros. Marine R. etc. Co*..... 164

30. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS. An instruction in a personal injury case to the effect that the defendant would be liable for an injury caused by its negligence, if the plaintiff was "without any greater want of care, prudence and skill . . . than was reasonably to be expected from a person of ordinary care," etc., is not prejudicially erroneous, although not as clear as it should have been upon the subject of contributory negligence. *Druglis v. Northwestern Imp. Co*..... 398

31. MASTER AND SERVANT—UNGUARDED COGS—FURNISHING APPLIANCES FOR SAFETY—INSTRUCTIONS—EXPOSED COGS NEGLIGENCE PER SE. It is not prejudicial error to instruct that defendant owed the duty to do all that "could possibly be done" to avoid an injury caused by cogwheels conceded to be unguarded, inasmuch as, under Laws 1903, p. 40, § 1, making it the defendant's positive duty to properly guard exposed cogwheels, it was the duty of the court to instruct that the defendant is guilty of negligence as a matter of law in failing to guard the same. *Hansen v. Seattle Lumber Co*..... 349

MASTER AND SERVANT—CONTINUED.

32. SAME — INSTRUCTIONS — SERVANT CHARGEABLE WITH KNOWLEDGE THAT COGWHEELS WOULD CRUSH HAND IF CAUGHT. It is not error to refuse to instruct that every person is charged by law with knowledge of the danger of coming in contact with unguarded cogwheels, where the jury were in the general charge fully instructed as to the plaintiff's duty and contributory negligence in working about such dangerous machinery. *Id*..... 349

33. MASTER AND SERVANT—INJURY FROM UNGUARDED SAW—DEFENSES—INDEPENDENT CONTRACTOR—EVIDENCE—QUESTION OF FACT. A corporation, the owner of a shingle mill, cannot avoid responsibility for injuries to employees by showing that the mill had been leased to an independent contractor who was in full charge and control at the time of the accident, where it appears that the lessor was one of the stockholders of the owner, and had previously been the general manager of the mill, that no announcement of the lease was made, except privately to one or two employees, and the change was not indicated in any way, that the employees generally did not know of the change and received their pay in checks of the corporation, and the lessor had stated that he could not settle the claim without authority from the company. *Erickson v. McNeeley & Co*..... 509

MERGER:

Of debt in judgment, see CORPORATIONS, 4.

MINES AND MINERALS:

Injury to miner by fall of rock, see MASTER AND SERVANT, 1, 13.

Construction of contract as to purchase price and stock, see CORPORATIONS, 1.

MINORS:

See INFANTS.

MISCONDUCT:

Of counsel, see CRIMINAL LAW, 14; TRIAL, 2.

MISJOINDER:

Of causes of action, finality of order, see APPEAL AND ERROR, 2.

MISTAKE:

Clerical error in recording judgment, effect, see JUDGMENT, 3.

Ground for reformation of instrument, see REFORMATION OF INSTRUMENTS, 1.

Payment of deposit to wrong party, see MONEY RECEIVED, 1.

Recovery for rock removed by mistake, pleading, see CONTRACTS, 5.

MONEY:

Obtaining under false pretenses, see CRIMINAL LAW, 2, 3, 8

MONEY RECEIVED:

1. MONEY RECEIVED—MISTAKE—ELECTION—NOTE FROM ONE OBLIGOR—JOINT LIABILITY—ESTOPPEL. Where by mistake a bank book belonging to a depositor in a bank came into the possession of another party of the same name, who had no right thereto, and the bank by mistake paid the amount of the deposit to such other party, who subsequently paid over part of the money to a corporation whose officers had full knowledge of the mistake, the bank may recover such money from the corporation, and the fact that the bank had taken a note from the party to whom the same had been first paid, and had undertaken to collect the same from such party, would not amount to an election to accept him as the sole creditor, or estop the bank from collecting from the corporation the portion of the money which it had received. *Merchants Bank v. Superior Candy & Cracker Co*..... 653

MONUMENTS:

See BOUNDARIES, 1.

MORTGAGES:

Redemption, see ACCOUNT, 1, 2, 4.

Personal property, see CHATTEL MORTGAGES.

By administratrix, when presumed regular, see EXECUTORS AND ADMINISTRATORS, 6.

Priority over assessment for irrigation, see WATERS, 1.

1. MORTGAGES—WITHOUT ACTUAL ACKNOWLEDGMENT—VALIDITY AS BETWEEN PARTIES—ESTOPPEL IN EQUITY TO QUESTION VALIDITY. A purchase money mortgage without actual acknowledgement, signed by the mortgagees when a certificate of acknowledgement was already filled out and signed, is valid as between the parties or purchasers of the property with notice. *Lynch v. Cade*..... 216

2. MORTGAGES—ABSOLUTE DEED AS A MORTGAGE—ESCROW—DELIVERY UPON DEFAULT—CUTTING OFF EQUITY OF REDEMPTION. Where money was borrowed for the purpose of paying a balance due on the purchase price of premises, and a note and mortgage on the property was then given to the lender, and as part of the same transaction a deed was made to the lender and placed in escrow under an agreement that the same should be delivered in case the note was not paid when due, the deed must be held to be a mortgage although the evidence tends to show that the parties intended otherwise; since it was such in its inception, the relation of debtor and creditor existed, and the equity of redemption cannot be cut off by such an agreement as part of an original transaction between parties under no previous contractual relation. *Plummer v. Ilse*..... 5

3. MORTGAGES — CONSTRUCTION — WHETHER COLLATERAL OR ORIGINAL UNDERTAKING—RELEASE BY CHANGED RELATION OF PRINCIPAL. Where mortgages are executed pursuant to a tripartite agreement, whereby

MORTGAGES—CONTINUED.

the mortgages were given by two of the parties to the third party, and the mortgagee agreed to pay stated sums to each mortgagor, it cannot be claimed by one of the mortgagors that he executed his mortgage as a surety mortgage, when the contract contains no reference to such suretyship and it was stipulated that certain liens against his land should be discharged, and there were other direct considerations moving to him, and it was one entire transaction; hence his mortgage would not be discharged by changed relations between the other two parties to the agreement. *Clambey v. Corliss*..... 327

4. MORTGAGES — FORECLOSURE — PARTIES — HEIRS OF DECEASED MORTGAGOR. After the death of a mortgagor, the heirs are necessary parties defendant to an action for the foreclosure of the mortgage. *Sawyer v. Vermont Loan and Trust Co*..... 524

5. MORTGAGES — RIGHTS OF MORTGAGEE IN POSSESSION UNDER VOID SALE—TENDER OF MORTGAGE DEBT—PARTITION. A mortgagee in possession in good faith under a void foreclosure sale, cannot be subjected to an action for a partition brought by heirs of the mortgagor, unless they tender their proportion of the amount due upon the mortgage; and a decree in partition in such a case will be modified by requiring such payment within sixty days, upon pain of a dismissal of the action. *Id*..... 524

6. MORTGAGES—PRIORITY OVER LIENS FOR IRRIGATION ASSESSMENTS—FAILURE TO FORECLOSE. Where a mortgagee has taken a deed of the mortgaged premises in satisfaction of the mortgage, which was never foreclosed, he cannot claim that his interest is prior and paramount to that of a lien for irrigation assessments, where the date of his conveyance does not appear. *Purdin v. Washington etc. Inv. Ass'n*..... 395

MOTIONS:

Dismissal of appeal, see APPEAL AND ERROR, 29-31.
Dismissal or nonsuit on trial, see TRIAL, 5-7.
Direction of verdict in civil actions, see TRIAL, 4, 5.
New trial in civil actions, see NEW TRIAL, 1-3.
Opening or vacating judgment, see JUDGMENT.

MUNICIPAL CORPORATIONS:

Condemnation for street, practice, damages, see EMINENT DOMAIN, 1.
Damages from defective sidewalk, see DAMAGES, 3.
Eight hour day on public works, see CONSTITUTIONAL LAW, 4.
Limitations against, see ADVERSE POSSESSION, 1.
Liquor license, assignability, see INTOXICATING LIQUORS, 1.
Ordinance providing for payment of claim, as cessation of controversy, see APPEAL AND ERROR, 30.

MUNICIPAL CORPORATIONS—CONTINUED.

Satisfaction of judgments against, see JUDGMENTS, 7.

Vacation of streets, power, constitutionality, see CONSTITUTIONAL LAW, 6.

1. MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIM—DAMAGES FROM GRADING STREET—NECESSITY—CHARTER—CONSTRUCTION. Art. 4, Sec. 29, of the charter of Seattle requiring all claims for damages to be filed with the city clerk within thirty days, applies to claims for damages to lots by reason of a change of grade, although the section provides that all such claims must "locate and describe the defect that caused the injury" (RUDKIN, J., dissenting). *Postel v. Seattle*..... 432

2. SAME—TIME FOR FILING—REASONABLENESS. Art. 4, Sec. 29, of the charter of Seattle requiring all claims for damages to be filed with the city clerk within thirty days, is not void as fixing an unreasonable time within which to file claims (RUDKIN, J., dissenting). *Id*..... 432

3. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—RESOLUTION OF INTENTION—CHANGES AND REPUBLICATION TO CORRECT INACCURACIES—SUFFICIENCY—STATUTE. A statute requiring the city counsel to first publish notice of its intention to make a local improvement, stating the name of the street to be improved and an estimate of the cost, is substantially complied with so that there is no jurisdictional defect, where the required resolution and ordinance were passed before the improvement was commenced, and the proceeding is not affected by the fact that, owing to a miscalculation or mistake, the original date for hearing was changed by the clerk by direction of the council before publication, and a second publication of the ordinance was had for the purpose of correcting an error, the resolution having specified the improvements and misleading no one, and when, by reference to the records, all necessary information could have been obtained. *North Yakima v. Scudder*..... 15

4. SAME—FAILURE TO SHOW ESTIMATED COST—ESTIMATE ON FILE—SUFFICIENCY. A municipal assessment for local improvements is not invalidated by reason of the fact that the notice, which was required to state an estimate of the cost, left the amount blank, since the property owners were thereby put on inquiry and from the estimate on file could have ascertained the amount. *Id*..... 15

5. SAME—PUBLICATION—OFFICIAL PAPER. An objection that notice of a municipal assessment for local improvements was not published in the official paper is unavailing where the paper had been designated as the official paper for a certain term, which had expired without the designation of any other official paper, since it was the *de facto* official paper for the purposes of the publication. *Id*..... 15

MUNICIPAL CORPORATIONS—CONTINUED.

5½. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS A lien for a municipal assessment for local improvements is not rendered void by reason of mere irregularities. *Id*..... 15

6. SAME—LETTING CONTRACT—ACT OF CITY COUNCIL—CONCLUSIVENESS. The objection that in letting a contract for a local improvement, the city council did not act to the best advantage, does not raise a jurisdictional question, but goes only to the discretion of the council, which will not be reviewed except for fraud or collusion. *Id*... 15

7. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—EVIDENCE—ADMISSIBILITY. It is immaterial that papers were introduced in evidence to show the authority of the commissioner of public works to deduct sums from the assessment of certain lots and add to the assessment of other lots, where the action of the commissioner was afterwards ratified by the city council. *Johnson v. Tacoma*..... 51

8. ESTOPPEL—TO ALLEGE ERROR ON APPEAL—ACCEPTING DEDUCTION OF BENEFITS FROM DAMAGES IN MUNICIPAL IMPROVEMENTS. Upon an appeal from the cancellation of an assessment of certain lots for local improvements, which the jury found were damaged $50 in excess of benefits, the city cannot be heard to assert that there was no authority for deducting the benefits from the damages in such a case, where the damages found were paid by the city, which thereby accepted the deduction of benefits made by the jury in assessing the damages. *Smith v. Seattle*..... 60

9. SAME—BENEFITS—SITUATION OF LOTS. Where lots are so situated as to leave an entrance from two streets it cannot be said that they do not abut upon the street at the rear of the houses as constructed thereon, or are not benefited by the improvement of such street. *Johnson v. Tacoma*..... 51

10. SAME—ASSESSMENTS—APPORTIONMENT. Where the improvement of a street required the construction of retaining walls to support the lower side of a street, and retaining walls had been constructed by certain lot owners, making it unnecessary for the city to construct such walls in front of such lots, it is not error to find the value of such walls to be $30 per lot, and that such lots would be benefited that much less by the improvement than other lots similarly situated, and the amount thus deducted may be equitably distributed in a proper ratio upon such other lots in the district, as the council find are not assessed to their full share of the expense according to the benefits received. *Id*..... 51

11. EVIDENCE—EXPERT—VALUES. Opinion or expert evidence is admissible to show the amount of benefits to real estate by reason of local improvements. *Id*..... 51

MUNICIPAL CORPORATIONS—CONTINUED.

12. EVIDENCE—EXPERTS—COMPETENCY. Real estate men having knowledge of the neighborhood are qualified to give opinion evidence as to the value of benefits from local improvements. *Id.*..... 51

13. MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — REASSESSMENTS—ACTION TO COMPEL—COMPLAINT—SUFFICIENCY. In an action to compel a reassessment to pay warrants for the cost of a municipal improvement, the assessment for which had been adjudged void, the complaint is not open to objection from having alleged that the first assessment was duly passed, or in failing to allege that it was void, where it is alleged that it was "adjudged void" by the superior court. *Waldron v. Snohomish*..... 566

14. SAME—PARTIES WHO MAY MAINTAIN ACTION. Any holder of warrants issued in payment of local improvements, the assessments for which are invalid, is entitled to plead any former adjudication holding the assessments void, whether a party to the former proceeding or not. *Id.*..... 566

15. MUNICIPAL CORPORATIONS—ACTIONS—HOLDERS OF WARRANTS—ESTOPPEL. The holders of warrants given in payment of a local improvement, the assessments for which are declared void, are not estopped from insisting upon a reassessment by the acceptance of interest or partial payments on their warrants. *Id.*..... 566

16. SAME—MANDAMUS TO COMPEL ASSESSMENT. The holders of warrants given in payment of a local improvement, the assessments for which are declared void, are entitled to a reassessment by a proper ordinance, and where this is refused, mandamus lies to compel the city officials to make such reassessment. *Id.*..... 566

17. MUNICIPAL CORPORATIONS — OFFICERS — PROCESS — NOTICE TO SUCCESSORS. In a proceeding against the mayor and members of a city council, duly served with process in their official capacity, to compel the performance of an official act, the service and notice applies to and binds their successors in office. *Id.*..... 566

18. MUNICIPAL CORPORATIONS — VACATION OF STREETS — NOTICE — COMPLIANCE WITH STATUTE. Under 1 Hill's Code, §§ 749, 752, providing for the vacation of streets and alleys and requiring certain notice to be given, a record of the city council showing the receipt of a petition for the vacation of an alley, that the committee on streets reported favorably, and that the petition was granted, is insufficient to show a legal vacation, or to raise the presumption that the required notice was given, as such proceeding was only preliminary. *Rapp v. Stratton*..... 263

19. SAME—PETITION—ESTOPPEL. One who petitions for the vacation of an alley, which is denied, is estopped from asserting that the same was vacated at some prior time. *Id.*..... 263

MUNICIPAL CORPORATIONS—CONTINUED.

20. MUNICIPAL CORPORATIONS—VACATION OF STREETS—PETITION—SUFFICIENCY. Under Laws 1901, p. 175, a petition for the vacation of a portion of a street is sufficient if signed by the owners of two-thirds of the lots abutting on the portion sought to be vacated. *Ponischil v. Hoquiam Sash and Door Co*..... 303

21. MUNICIPAL CORPORATIONS—STREETS—VACATION—POWER OF COURTS TO REVIEW. The vacation of streets is an exercise of a legislative or political function that will be reviewed by the courts for collusion or fraud only. *Id*..... 303

22. SAME—COLLUSION—BENEFIT TO PETITIONER. The fact that the vacation of a street is for the benefit of the petitioner does not show such fraud or abuse of discretion, as to authorize a court of equity to interfere. *Id*..... 303

23. SAME—DAMAGES—TO LOT NOT ABUTTING ON PORTION VACATED—SPECIAL INJURY—SHOWING—SUFFICIENCY. The owner of city lots at the entrance of a *cul de sac* formed by the vacation of a portion of a street, is not entitled to damages for the vacation, unless special damages are sustained different in character from that suffered by the public at large. *Id*..... 303

24. SAME—DAMAGES—EVIDENCE. The owner of property does not appear to be specially damaged by the vacation of a portion of a street, forming a *cul de sac* in the vicinity, where the street had never been opened for travel, the business portion of the city was in the opposite direction, and the value of his property was not lessened. *Id*.. 303

25. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—EVIDENCE—SUFFICIENCY. In an action for injuries received in a fall upon a defective sidewalk, a verdict for the defendant is justified where there was little or no evidence that the injury was caused by the defects. *Shannon v. Tacoma*..... 220

26. MUNICIPAL CORPORATIONS — NEGLIGENCE — DEFECTIVE SIDEWALK — NOTICE—EVIDENCE—SUFFICIENCY. A finding of negligence on the part of a city as to a sidewalk, is sustained where there was evidence to the effect that the walk had long been out of repair, that the particular defect had existed more than a month, and had been called to the attention of the city officers and council prior to the accident. *Harris v. Mt. Vernon*..... 444

27. MUNICIPAL CORPORATIONS—NEGLIGENCE—STREETS—FILING CLAIM. An ordinance requiring claims against a city to be presented to the city council within three days, where injuries are alleged to have been caused by the existence of snow or ice, does not apply where the gist of the negligence alleged was a broken plank with no support for the broken end, which defect had existed long prior to the injury, and the mention of snow and ice in the complaint was only incidental, and a condition of the accident, and not a primary or essential cause contributory to the accident. *Short v. Spokane*. 257

MUNICIPAL CORPORATIONS—Continued.

28. Municipal Corporations — Defective Sidewalk — Contributory Negligence—Evidence. The fact that a person travels on a sidewalk known to be defective when there was another route that might have been taken, may be shown upon the issue of contributory negligence. *Shannon v. Tacoma*..... 220

29. Municipal Corporations — Negligence — Streets — Condition of Walk Prior to Injury—Admissibility—Complaint—Sufficiency. In an action for personal injuries sustained through a defect in a sidewalk, the allegation in the complaint that the city carelessly neglected to nail down the planks knowing of the unsafe condition of the walk, is sufficient to authorize evidence of constructive notice on the part of the city by the existence of defects prior to the time of the accident. *Brown v. Blaine*..... 287

30. Same—Evidence—Condition in Vicinity—Admissibility. In an action for injuries sustained through a defect in a sidewalk it is competent to prove the general condition of the walk for a reasonable distance on each side of the defect in question. *Harris v. Mt. Vernon*..... 444

31. Same—Instructions—Notice. It is misleading to instruct the jury that a city is liable for only such defects in sidewalks as are apparent or suggested by appearance or disclosed by a test in the nature of ordinary use; but the jury should be instructed that a city is chargeable with notice of a dangerous opening in a sidewalk if it had existed such a length of time that the city might have discovered it by exercising ordinary care. *Short v. Spokane*..... 257

32. Same—Degree of Care. In an action for injuries sustained upon a sidewalk affected by snow and ice, it is proper to instruct the jury to the effect that the city's duty to keep sidewalks in repair may be measured or affected by weather conditions. *Id*..... 257

33. Same—Contributory Negligence. It is proper to instruct that the city would be liable for its negligence which was the proximate cause of the injury although the plaintiff may have been guilty of contributory negligence which was only a remote cause or condition of the accident. *Id*..... 257

34. Same—Instructions—General Condition in Vicinity of Accident. In an action for injuries sustained through a defect in a walk, it is proper to instruct that the jury may consider the general condition of the sidewalk in the immediate vicinity. *Harris v. Mt. Vernon*..... 444

35. Same—Damages—Aggravation of Disease. In an action for personal injuries sustained through a defective sidewalk, an instruction is proper which declares that the city is chargeable with notice of the fact that people of different bodily conditions have a right to travel thereon, and the city would be rendered liable for the aggravation of disease or bodily defects resulting from injuries caused by the city's negligence. *Short v. Spokane*..... 257

NAMES:

In deeds, see DEEDS, 1.
In chain of title, identity, see PARTITION, 1.

NEGLIGENCE:

See CARRIERS, 1, 2.
Of city in care of streets or sidewalks, see MUNICIPAL CORPORATIONS, 25-35.
Of contractor in remodeling building, liability of landlord, see APPEAL AND ERROR, 40.
Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 18-26.
Defective lathe, promise to repair, see MASTER AND SERVANT, 16.
Demised premises, see LANDLORD AND TENANT, 1, 2.
In failing to guard: chipper, see MASTER AND SERVANT, 7, 25, 26; cogs, see MASTER AND SERVANT, 9, 17, 19, 21, 27, 31, 32; couplings, see MASTER AND SERVANT, 5, 8, 11, 29; laundry mangle, see MASTER AND SERVANT, 2; saw, see MASTER AND SERVANT, 6, 14, 23, 28.
Failure to furnish props in mine, see MASTER AND SERVANT, 13.
Failure to instruct servant as to dangers, see MASTER AND SERVANT, 15.
Failure to provide belt shifters, see MASTER AND SERVANT, 3, 4, 12.
Fires caused by operation of railroad, see RAILROADS, 1, 2.
Removal of lateral support without negligence, see ADJOINING LANDOWNERS, 1.
In setting broken leg, see PHYSICIANS AND SURGEONS.
Setting dangerous agency in operation, see MASTER AND SERVANT, 10.

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWSPAPERS:

Publication of process, official paper, see MUNICIPAL CORPORATIONS, 5; TAXATION, 4, 5.

NEW TRIAL:

See TRIAL, 4.
Review, see APPEAL AND ERROR, 21; CRIMINAL LAW, 16.
Misconduct of juror as ground, see CRIMINAL LAW, 12, 13.
Misconduct of counsel as ground, see CRIMINAL LAW, 14.

1 NEW TRIAL—JURORS—MISCONDUCT. A new trial for misconduct of a juror in want of attention to the testimony should not be granted on conflicting evidence, and where it appears that the juror was not wilfully guilty, or that the parties were mistaken as to his acts. *Shannon v. Tacoma*..... 220

2. NEW TRIAL—CONTINUANCE—SURPRISE. In an action upon a promissory note brought against the wife, as executrix of the estate of

NEW TRIAL—CONTINUED.

her husband, one of the joint makers of the note, in which the plaintiff had alleged payments tolling the statute of limitations, without specifying by whom the payments had been made, the defendant is entitled to a continuance of the case or a new trial, where the court had denied her motion to make the complaint more definite and certain by stating by whom, to whom, and when the payments had been made, and where it appears that she was surprised at the trial by the evidence of a witness who claimed to have acted as agent of the holder of the note, and who testified to a payment of $2 made by the deceased in September, 1897, at the city of S, which was the payment relied upon by the plaintiff to toll the statute; and where the defendant testified at the trial that the deceased had been a helpless invalid since 1896, unable to attend to any business or make any payments on the note, and that he had not been at the city of S but once since 1896, when she accompanied him, and that she could not state at the time what year that trip was made, but would be able to do so if time was given to communicate with parties at S; and after the trial affidavits were produced to the effect that the aforesaid trip to S had been made in April, 1900. *O'Neil v. Lindsey*..... 649

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE. A new trial for newly discovered evidence should not be granted where it is only cumulative of admitted facts, and does not go to aid that part of the case which was lacking in sufficiency of proof. *Shannon v. Tacoma*. 220

NOMINAL DAMAGES:

See DAMAGES, 8.

NONRESIDENCE:

Effect on limitation, see LIMITATION OF ACTIONS, 4, 5.

NONSUIT:

On trial, see TRIAL, 5-7.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of action or process, see ADVERSE POSSESSION, 3; PROCESS, 1, 2.

Of appeal, see APPEAL AND ERROR, 18.

Of appointment of guardian, see GUARDIAN AND WARD, 1, 2; INSANE PERSONS, 2.

Appointment of receiver, see RECEIVERS, 2.

To city officers, binding upon successors, see MUNICIPAL CORPORATIONS, 17.

NOTICE—CONTINUED.

On the part of city of defective street, see MUNICIPAL CORPORATIONS, 26, 29, 31.
Claim for injuries from defective sidewalk, see MUNICIPAL CORPORATIONS, 1, 2, 27.
Of limitation of attorney's authority to compromise claim, see COMPROMISE AND SETTLEMENT, 1.
Loss insured against, see INSURANCE, 8.
Proposed public improvement, see MUNICIPAL CORPORATIONS, 3-5.
Of sale by receiver, see RECEIVERS, 6.
Of suit in ejectment, see LIS PENDENS, 1.
Of tax foreclosure, see TAXATION, 1-7.
For termination of lease, see LANDLORD AND TENANT, 4.
Of unpaid stock subscriptions, necessity to fix liability of stockholders, see CORPORATIONS, 6.

NUISANCE:

1. NUISANCE — ABATEMENT — INJUNCTION—PLEADING—ALLEGATION OF DAMAGES. A complaint for the abatement of a nuisance by the maintenance of a shooting gallery and musical instruments sufficiently alleges substantial damages without stating any amount, where it appears that patrons of the plaintiff's rooming house have been driven away by the nuisance which, if not abated, will destroy the plaintiff's business. *Grantham v. Gibson*..... 125
2. SAME—INJURY TO BUSINESS—ACTION BY TENANT. An action to abate a nuisance can be maintained by the owner of a leasehold interest, where the injury done does not affect the freehold but works an injury to the business of the lessee, and where the complaint shows that the plaintiff has no adequate remedy at law.
3. NUISANCE—ABATEMENT—TEMPORARY INJUNCTION—SUFFICIENCY OF SHOWING. The evidence sufficiently shows that the operation of a shooting gallery and musical instruments in the lower story of a building was specially injurious to the plaintiff, a tenant who used the upper stories as a hotel and rooming house, and amounted to a nuisance warranting a temporary injunction, where it appears that the operation of the defendants' business drove away the patrons of the plaintiff and kept him from obtaining others. *Id*..... 125

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 8.
To validity of tax lien, see TAXATION, 8.

OFFICERS:

See JUSTICES OF THE PEACE; RECEIVERS.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 1.

ORDERS:

Finality, see APPEAL AND ERROR, 1, 2.
Appointing successor to administrator, review, see APPEAL AND ERROR, 32.
Of default, incorporation in judgment, see JUDGMENT, 2.

PARENT AND CHILD:

Agreement to support, see CONTRACTS, 1-3.

PAROL AGREEMENTS:

Oral statements varying writing, see BILLS AND NOTES, 3, 4; SALES, 5.

PARTIES:

See MANDAMUS, 2.
Aggrieved, right to appeal, see APPEAL AND ERROR, 13, 14.
Garnishee, interested in less than $200, right to appeal, see APPEAL AND ERROR, 5.
Heirs necessary parties to foreclosure, see MORTGAGES, 4.
When husband not necessary party, see HUSBAND AND WIFE, 1.
Inclusion in judgment of parties not bound, see JUDGMENT, 4.
Concluded by judgment in ejectment, see LIS PENDENS, 1.
In proceeding for reassessment to pay warrants, see MUNICIPAL CORPORATIONS, 14.

PARTITION:

When barred by statute, see LIMITATION OF ACTIONS, 1.
By heirs against mortgagee in possession, see MORTGAGES, 5.
By wife domiciled in foreign state, see HUSBAND AND WIFE, 1.

1. PARTITION — EVIDENCE — TITLE OF PLAINTIFF'S PREDECESSOR — TWO PERSONS OF SAME NAME—IDENTITY—BURDEN OF PROOF. In an action for partition, a finding that the plaintiff failed to show any title to the premises is sustained where it appears that the title was formerly held by J. W., of the city of S, that there were two persons in such city by that name, that J. W. had conveyed his interests, and the plaintiff claimed a half interest through heirs of the deceased wife of J. W., whose will made no mention of this property, which was not included in the inventory of the estate, and the plaintiff failed to show by the preponderance of evidence that the title was held by the J. W. who was the husband of the plaintiff's predecessor in interest. *Hyde v. Britton*..... 277

PARTNERSHIP:

Nonresident, service of process upon, see PROCESS, 2.
Specific performance of partnership agreement, see SPECIFIC PERFORMANCE, 1.

PARTNERSHIP—CONTINUED.

1. PARTNERSHIP—TERMINATION. A partnership agreement for the ownership of a house and lot standing in the name of one party cannot be summarily terminated by such party on becoming dissatisfied with the manner of performance of the other party. *Lawrence v. Halverson*..... 534

2. PARTNERSHIP—AGREEMENT FOR—EVIDENCE—SUFFICIENCY. There is sufficient evidence of a partnership agreement whereby the plaintiff was to perform the work and labor and the defendant to furnish the money to construct a house upon premises to be owned by them jointly, where it appears by the testimony of both parties that the land was bought by the defendant, who also furnished money to buy the materials for the house, and the house was built by the plaintiff pursuant to such an arrangement, the defendant admitting that originally the agreement was that she was to sell the house and the plaintiff was to "get his share when the property was sold." *Id.* 534

PART PAYMENT:

As consideration for release of surety, see PRINCIPAL AND SURETY, 1.

PART PERFORMANCE:

See FRAUDS, STATUTE OF, 1, 2.

PERFORMANCE:

Of contract for sale of lands, see VENDOR AND PURCHASER, 4, 7.

PASSAGEWAY:

Between fish trap locations, see FISH, 1, 2.

PASSENGERS:

See CARRIERS, 1, 2.

PATENTS:

For public lands, see PUBLIC LANDS, 4, 5.

PAYMENT:

Of judgment to attorney, see ATTORNEY AND CLIENT, 1; JUDGMENT, 7; to guardian, see INFANTS, 1.

As condition for specific performance, see JUDGMENT, 1.

Of promissory note by deposit by surety, see BILLS AND NOTES, 5.

On warrants as estoppel against reassessment, see MUNICIPAL CORPORATIONS, 15.

PENDENCY OF ACTION:

Effect as to property involved, see LIS PENDENS.

PERJURY:

Of juror, as ground for writ of *coram nobis*, see CRIMINAL LAW, 5.

PERSONAL INJURIES:

See TRIAL, 3.
To employee, see MASTER AND SERVANT.
To passenger, see CARRIERS, 1, 2.
Excessive damages, see DAMAGES, 1-4.
Claim for, compromise by attorney, see COMPROMISE AND SETTLEMENT, 1.
Notice of claim, reasonableness of city charter, see MUNICIPAL CORPORATIONS, 1, 2; accidents through snow and ice, see Id., 27.
Evidence of value of physician's services, see DAMAGES, 5.
Mortuary tables as proof of damages, see DAMAGES, 7.
Previous physicial condition, see DAMAGES, 6.
Harmless error in admission of evidence, see APPEAL AND ERROR, 35-37.
To traveler on street or highway, see MUNICIPAL CORPORATIONS, 25-35.

PETITION:

For sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, 4, 5.

PHYSICIANS AND SURGEONS:

Services in personal injury case, proof of value, see DAMAGES, 5.

1. MALPRACTICE—NEGLIGENCE IN SETTING BROKEN LEG—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for malpractice in setting a broken leg a *prima facie* case of want of skill and diligence is shown, and it is error to grant a nonsuit, where it appears from the testimony of the plaintiff that when the plaster cast was removed, after four weeks, the leg was found to be crooked and the plaintiff was very lame, walking on the side of the foot, that he went to a hospital and the leg was rebroken and reset, after which his condition was very much improved, and where an expert testified to the effect that if the leg was crooked when the case was removed it indicated something more than "a bad result" and that it had not been treated with ordinary skill. *Peterson v. Wells*..... 693

PLEADING:

Abatement of nuisance, see NUISANCE, 1, 2.
Amendments to conform to proof, see APPEAL AND ERROR, 11.
Answer in ejectment, variance, see EJECTMENT, 1.
Complaint for personal injuries, sufficiency, see MASTER AND SERVANT, 22.
Complaint for injuries through defective street or sidewalk, see MUNICIPAL CORPORATIONS, 29.
Complaint for reassessment to pay warrants, see MUNICIPAL CORPORATIONS, 13.
Construction when first assailed at trial, see BILLS AND NOTES, 6.
Contributory negligence as a defense to fire, see RAILROADS, 2.

PLEADING—CONTINUED.

Misjoinder of causes of action, finality of order, see APPEAL AND ERROR, 2.

Necessity of objections for purpose of review, see APPEAL AND ERROR, 8.

Petition for appointment of guardian, see INSANE PERSONS, 1.

Recovery for item not pleaded, see CONTRACTS, 5.

To set aside tax deed, see TAXATION, 12.

Petition for vacation of street, see MUNICIPAL CORPORATIONS, 20.

In criminal prosecutions, see CRIMINAL LAW, 1-5, 18.

1. PLEADINGS — BREACH OF BUILDING CONTRACT — COMPLAINT — CERTAINTY. It is not error to refuse to order a complaint for breach of a building contract to be made more definite and certain where it contained a copy of the specifications in full and alleged the substance of the contract. *Ekstrand v. Barth*..... 321

2. PLEADINGS—AMENDMENTS TO CONFORM TO PROOF—SURPRISE. It is proper to allow an amendment to the complaint to conform to the proof that an architect's certificate was duly given, although it was not pleaded, where it appears that on a former trial the same was offered and received in evidence, and that on the same trial the defendant offered evidence in rebuttal thereof, and could not have been surprised; especially where the order allowing the amendment recites that the objections to the evidence were not argued until after the parties had introduced their evidence and rested, and no improper advantage was obtained. *Gritman v. United States Fidelity etc. Co*..... 77

PLEAS:

In criminal prosecution, see CRIMINAL LAW, 18.

PLEDGES:

Redemption, see ACCOUNT, 3, 4.

1. PLEDGES—LIQUOR LICENSE—AGREEMENT PLEDGING AS COLLATERAL SECURITY—FAILURE TO FILE OR RECORD—EFFECT AS TO CREDITORS—STATUTES. A pledge of an unexpired liquor license left in the possession of the licensee is void as to creditors, whether construed as a chattel mortgage or as a bill of sale, when it was not recorded as a chattel mortgage as required by Pierce's Code, § 6549, nor as a bill of sale, as required by Bal. Code, § 4578. *Degginger v. Seattle Brewing and Malting Co*..... 385

POLICE POWER:

See CONSTITUTIONAL LAW, 1 2.

POSSESSION:

As part performance, see FRAUDS, STATUTE OF, 1.

Character of to establish title, see ADVERSE POSSESSION, 2, 3.

Within period of limitation, see LIMITATION OF ACTIONS, 1.

PRACTICE:

Examination of parties concealing assets, see EXECUTORS AND ADMINISTRATORS, 8.

PREJUDICE:

Presumption of from misconduct of juror, see CRIMINAL LAW, 13.

PREMIUMS:

For insurance, recovery, see INSURANCE, 10.

PRESCRIPTION:

Acquisition of rights, see ADVERSE POSSESSION, 1-3.
Establishment of highways, see HIGHWAYS, 1.

PRESUMPTIONS:

Continuation of trust, see EXECUTORS AND ADMINISTRATORS, 2.
In aid of executor's sale, see EXECUTORS AND ADMINISTRATORS, 4, 5.
Of intending consequences of voluntary acts, see CRIMINAL LAW, 15.
Of prejudice from misconduct of juror, see CRIMINAL LAW, 13.
Of regularity of mortgage by administratrix, see EXECUTORS AND ADMINISTRATORS, 6.

PRINCIPAL AND AGENT:

Contract, see VENDOR AND PURCHASER, 1.
Contractor as agent of surety for delivery of indemnity bond, see INDEMNITY, 1.
Insurance agents, want of authority, see INSURANCE, 4.
Neglect of agent as ground for vacating judgment, see JUDGMENT, 5.
Service of summons upon agent of nonresident copartnership, see PROCESS, 2.

PRINCIPAL AND SURETY:

See INDEMNITY.
Co-sureties on promissory note, contribution, see LIMITATION OF ACTIONS, 2.
Deposit by surety, as payment, see BILLS AND NOTES, 5.
Liability of indorser as co-surety, contribution, see BILLS AND NOTES, 1, 2.
Mortgage alleged as surety, discharge, see MORTGAGES, 3.
Parol evidence of suretyship, and of release by parol, see BILLS AND NOTES, 3, 4.

1. PRINCIPAL AND SURETY—RELEASE OF SURETY—CONSIDERATION—PAYMENT OF PART—SUFFICIENCY. An agreement for an immediate payment of part of a debt is sufficient consideration for the release of a surety from obligation to pay the remainder. *Baldwin v. Daly*.. 416

PRIORITIES:

Of mortgages, see MORTGAGES, 6.
Recording of deeds, see DEEDS, 2-4.
Of irrigation assessment over mortgage, see WATERS, 1.
Of receiver's certificates, labor claims, see RECEIVERS, 5, 8-10.

PROBATE COURTS:

Findings and conclusions, see TRIAL, 9.

PROCESS:

Necessity of personal service, appointment of guardian, see INSANE PERSONS, 2.
Service upon officers binding upon successors, see MUNICIPAL CORPORATIONS, 17.
In tax foreclosure cases, see TAXATION, 1-7.

1. PROCESS — SUMMONS — SERVICE BY PUBLICATION — FORM — SUFFICIENCY. A summons by publication in the statutory form, served upon a defendant outside of the state, is not defective by reason of containing the clause requiring the defendant to appear in twenty days after the service if service shall be made within the state, which clause may be treated as surplusage. *Lawyer Land Co. v. Steel.* 411

2. PROCESS—SUMMONS—SERVICE UPON AGENT—ACTION AGAINST NONRESIDENT CO-PARTNERSHIP. Bal. Code, § 4875, subdvs. 8 and 9, providing for the method of service of a summons upon a company or association, has no application to a copartnership, and hence a service upon the resident agent of a nonresident copartnership is not authorized. *Coughlin v. Pinkerton*..... 500

PROHIBITION:

1. PROHIBITION—WHEN LIES—QUASHING GARNISHMENT—REMEDY BY APPEAL. Prohibition does not lie to prevent the superior court from quashing a writ of garnishment, inasmuch as there is a remedy by appeal staying all proceedings pending the appeal. *State ex rel. Goupille v. Superior Court*..... 128

PROMISSORY NOTES:

See BILLS AND NOTES.

PROOF:

Of loss insured against, waiver, see INSURANCE, 8.

PROPERTY:

Constitutional guaranties of rights of property, see CONSTITUTIONAL LAW, 1, 2.
Retail liquor license, see INTOXICATING LIQUORS, 1.
Taking or damaging for public use, see EMINENT DOMAIN.

PROXIMATE CAUSE:

Of injury through defective street, see MUNICIPAL CORPORATIONS, 33.
Of injury to servant, see MASTER AND SERVANT, 8, 9, 22.

PUBLICATION:

Service of process, see PROCESS, 1; TAXATION, 3-7.
Of notice of appointment of guardian, see INSANE PERSONS, 2.
Of notice of local improvement, see MUNICIPAL CORPORATIONS, 5.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 3-16.

PUBLIC LANDS:

Descent of lands allotted to Indian, see INDIANS, 1-3.
Title by patent, rule of decision, see COURTS, 1, 2.

1. PUBLIC LANDS — ENTRY — WHO MAY MAKE — EMPLOYEE IN LAND OFFICE. Under U. S. Rev. Stat., § 452, a special timber agent appointed by the general land office is prohibited from making an entry on public lands, and his entry of lands under the timber culture act is void. *Prosser v. Finn*..... 604

2. SAME — CONTEST — DECISION OF LAND DEPARTMENT — WHEN CONCLUSIVE—REDRESS IN COURTS. A ruling of the land department upon the cancellation of a public land entry is conclusive where no rights have been denied the applicant, and no error has been committed in deciding upon the legal rights involved. *Id*..... 604

3. SAME—ILLEGAL ENTRY—IMPROVEMENTS — SUBSEQUENT ENTRYMAN TRUSTEE. One who files on public land after the termination of a contest in the land department resulting in the cancellation of an earlier entry by another, is not a trustee of the title for such unsuccessful applicant, by reason of knowledge of his improvements on the lands, where such improvements were made with no legal claim to the land. *Prosser v. Finn*..... 604

4. PUBLIC LANDS—HOMESTEAD—HUSBAND AND WIFE—DIVORCE—COMMUNITY PROPERTY. A divorced wife acquires no interest in a homestead, patent for which is subsequently issued to the husband, where at the time of the divorce the husband had only the right of occupancy and a preference right to make entry upon the extension of the public surveys; since the Federal law controls as to the title obtained by a patent and the community property laws of the state are not recognized. *Hall v. Hall*..... 186

5. PUBLIC LANDS—HOMESTEAD—HUSBAND AND WIFE—TITLE OF SURVIVOR. A patent issued under the homestead laws to the surviving husband conveys the whole title to the husband, to the exclusion of the heirs of the wife, under U. S. Rev. Stat., §§ 2291, 2292; since the community property laws of the state cannot control the Federal provisions as to such title, and do not apply. *Cunningham v Krutz*..... 190

PUBLIC WORKS:

Eight hour day upon, see CONSTITUTIONAL LAW, 4.

PUNISHMENT:

Upon third conviction of felony, see CRIMINAL LAW, 11.

QUESTION FOR COURT:

Guard for exposed couplings, see MASTER AND SERVANT, 5, 29.

QUESTIONS FOR JURY:

See CARRIERS, 2; RAILROADS, 2.

Agreement as to salary, see CONTRACTS, 10.

Authority of attorney to compromise death claim, see COMPROMISE AND SETTLEMENT, 1.

Contributory negligence and assumption of risk, see MASTER AND SERVANT, 17-21, 23, 25.

Feasibility of guarding chipper, see MASTER AND SERVANT, 7.

Guard for saw, see MASTER AND SERVANT, 6.

Negligence in failing to furnish props in mine, see MASTER AND SERVANT, 1.

Necessity for belt shifter, see MASTER AND SERVANT, 3, 4.

Removal of lateral support, see ADJOINING LANDOWNERS, 2.

RAILROADS:

Regulation of sale of tickets, constitutionality, see CONSTITUTIONAL LAW, 2, 3, 5, 7; STATUTES, 2.

Right of way, construed as used in insurance policy, see INSURANCE, 2.

Speed of train, evidence, opinion of brakeman from appearance of wreck, see EVIDENCE, 1.

1. RAILROADS—FIRES—ON RIGHT OF WAY—CONTRIBUTORY NEGLIGENCE. In an action to recover the value of a barn destroyed by a fire set out on a railroad right of way, on the opposite side of a river about 150 to 200 feet wide, evidence on the part of the plaintiff that he had known of the fire raging on the right of way for a day or two, and particularly on the morning in question, and that he left a wide door open on that side of the barn, warrants an instruction to the jury as to the plaintiff's negligence to the effect that the defendant was not liable if the plaintiff failed to use ordinary care to protect his property; and an order granting a new trial solely on the ground of error in such instruction will be reversed. *Brown v. Oregon Railroad & Navigation Co*..... 688

2. NEGLIGENCE — FAILURE TO PLEAD CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. In an action to recover the value of a barn, destroyed by a fire negligently set out upon a railroad right of way, it is proper to submit to the jury an issue, raised by the evidence of the plaintiff, as to the contributory negligence of the plaintiff in not protecting his property, although contributory negligence was not pleaded as a defense to the action. *Id*..... 688

RAPE:

Information, duplicity, see CRIMINAL LAW, 4.

RATIFICATION:

Of act of attorney, see ATTORNEY AND CLIENT, 2.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

See MORTGAGES; PARTITION; PUBLIC LANDS, 1-5.
Actions, limitation, see LIMITATION OF ACTIONS, 1, 5.
Claimed as homestead, sale, see HOMESTEADS, 1, 2.
Conveyance by parents for support, reversion, see CONTRACTS, 1, 2.
Of nonresident incompetent, sale, see INSANE PERSONS, 4.
Possession and improvements, as part performance of oral lease, see FRAUDS, STATUTE OF, 1, 2.
Sale or mortgage under order of court, see EXECUTORS AND ADMINISTRATORS, 4-7.

RECEIPTS:

When constituting a present contract of insurance, see INSURANCE, 4-6.

RECEIVERS:

Assets, retail liquor license, see INTOXICATING LIQUORS, 1.
Order refusing to vacate appointment, appealability, see APPEAL AND ERROR, 1.

1. RECEIVERS — FOR INSOLVENT CORPORATION — APPOINTMENT AT INSTANCE OF SIMPLE CONTRACT CREDITOR. A receiver may be appointed for an insolvent corporation upon the suit of a simple contract creditor upon a showing of insolvency, and without any showing that judgment and execution would be a useless formality. *Davis v. Edwards*..... 480

2. SAME—JURISDICTION TO APPOINT—WAIVER OF NOTICE OF APPLICATION BY DE FACTO PRESIDENT. The jurisdiction to appoint a receiver for an insolvent corporation upon the waiver of notice of the application by the president of the corporation, does not depend upon the consent of the president, nor upon the question whether the acting president had title to the office or authority to waive notice. *Id.* 480

3. SAME—COLLUSION—EVIDENCE. The charge of collusion between the president and officers of a corporation, resulting in the appointment of a receiver, is not sustained by proof to the effect that they preferred the appointment of a receiver to the securing of liens and the sale of the property. *Id*..... 480

4. SAME—INSOLVENCY—FINDINGS—EVIDENCE—SUFFICIENCY. Findings of the trial court upon an application for the appointment of a re-

RECEIVERS—CONTINUED.

ceiver of an insolvent mining corporation, that the corporation was insolvent, will be sustained on appeal where the evidence is conflicting and proof of insolvency not convincing, and where the witnesses who had had the management and control of the corporation testified that it was insolvent, and none of the parties interested offered to pay the small claim for which the suit was brought. *Id.*... 480

5. RECEIVERS — SALES — CERTIFICATES AS PART OF PURCHASE PRICE. A receiver's sale cannot be attacked on the ground that the purchaser had an understanding with the court that certain receiver's certificates should be received as part of the purchase price where such certificates were entitled to priority and must first be paid out of the proceeds of the sale. *Nisbet v. Great Northern Clay Co.*. 107

6. RECEIVERS—SALES—NOTICE. It is not necessary to give creditors notice of a receiver's sale, where the sale is made in good faith and is for the best interests of the trust. *Id*..... 107

7. RECEIVERS — SALES — CONFIRMATION. The confirmation of a receiver's sale, consented to by all the creditors excepting one, should not be set aside at the instance of a single creditor, where it is not shown that any higher sum could be realized upon a resale, and the highest sum possible seems to have been obtained. *Id*..... 107

8. SAME—RECEIVER'S CERTIFICATES—PRIORITY. A creditor is in no position to contest the priority of receiver's certificates which recited that they were a first lien on the assets, where his rights were based upon a similar receiver's certificate reciting that the others were prior liens; nor could he contest the priority of another earlier certificate which by inadvertence was not mentioned in his certificate. *Id*..... 107

9. SAME—CLAIMS FOR LABOR—PRIORITY. A receiver's certificate is junior to the claims of laborers for services performed for the receiver, under Laws 1897, ch. 43; especially where it states on its face that it is subject to the expenses of the trust. *Id*..... 107

10. RECEIVERS—CLAIMS FOR LABOR—ALLOWANCE—CORPORATIONS—EMPLOYMENT OF STOCKHOLDERS—MEETINGS—RESOLUTIONS—EFFECT. Upon the receivership of an insolvent corporation, a general creditor cannot defeat the allowance of preferred claims for labor, performed by various stockholders in the capacity of employees within six months from the appointment of the receiver, by an objection to the validity of a stockholder's resolution fixing certain compensation for such stockholders, where there was sufficient evidence to sustain the finding that the resolution was never acted upon by the corporation, and was waived by the stockholders, and that they were regularly credited with the reasonable value of the services rendered by them; and the conclusion of law that they were entitled to preferred claims was proper. *Cors & Wegener v. Ballard Iron Works*..... 390

RECEIVERS—CONTINUED.

11. RECEIVER—ALLOWANCE FOR FEES. An allowance of $2,000 for a receiver and his attorney out of an insolvent estate from which $11,200 was realized held not excessive on the showing made. *Nisbet v. Great Northern Clay Co*..... 107

RECORDS:

On appeal, see APPEAL AND ERROR, 19-26; CRIMINAL LAW, 16.
Of appointment of guardian, what to contain, see GUARDIAN AND WARD, 2.
Of deeds, see DEEDS, 2-4.
Of field notes in surveyor general's office, conclusiveness, see BOUNDARIES, 2.
Recording assignment of liquor license, see PLEDGES, 1.
Recording judgment, clerical error, effect, see JUDGMENT, 3.

1. EVIDENCE—CERTIFIED COPY OF RECORD—ADMISSIBILITY—NECESSITY OF PROVING SIGNATURES TO ORIGINAL—STATUTE. Under Bal. Code, § 6064, a copy of a recorded deed, certified by the recording officer over the seal of his office, is admissible in evidence without proof of the genuineness of the signatures to the original deed. *Chrast v. O'Connor*..... 360

REDEMPTION:

From mortgage, cutting off right, see MORTGAGES, 2.

REFORMATION OF INSTRUMENTS:

1. REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE—SUFFICIENCY. A claim that there was a mistake in a contract agreeing to convey a certain number of acres of a tract of land, in not describing a certain tract, entitling a party to a reformation, is not sustained where the evidence of one witness to that effect is contradicted by the other party and by the attorney who drew up the contract. *Clutter v. Strange*..... 86

RELEASE:

Of claim for death by attorney, see COMPROMISE AND SETTLEMENT, 1.
Of equity of redemption, see CHATTEL MORTGAGES, 1.
Of insurer by breach of subrogation clause, see INSURANCE, 7.
Of alleged surety mortgage by changed relations, see MORTGAGES, 3.
Of surety by parol, see BILLS AND NOTES, 4; by part-payment, see PRINCIPAL AND SURETY, 1.

REMOVAL:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 9.

REPAIRS:

Of demised premises, see LANDLORD AND TENANT, 1, 2.
Liability of landlord without negligence, see ADJOINING LANDOWNERS, 5.

REPEAL:

Of statutes, see STATUTES, 1, 3.

REPLEVIN:

Remedy of vendor for fraud, see SALES, 3.

RESCISSION:

Of contract, see CONTRACTS, 3-5.
Of contract for sale of land, see VENDOR AND PURCHASER, 3-6.
Right to rescind partnership agreement, see PARTNERSHIP, 1.

RES GESTAE:

Statements of insured explaining accident, see INSURANCE, 3.

RESIGNATION:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 3.

RETROSPECTIVE LAWS:

Betterment act, see EJECTMENT, 2, 3.

REVIEW:

See APPEAL AND ERROR, 32-43; CERTIORARI; CRIMINAL LAW, 5, 7, 12-18.
By writ of *coram nobis*, see CRIMINAL LAW, 5.

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Of letters of administration, see EXECUTORS AND ADMINISTRATORS, 9.

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Definition, as used in insurance policy, see INSURANCE, 2.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 4, 11-18.
Within insurance policy, see INSURANCE, 1, 2.

ROADS:

See HIGHWAYS.

SALES:

Of realty, see VENDOR AND PURCHASER.
When a mortgage, see CHATTEL MORTGAGES, 1.
By personal representatives, see EXECUTORS AND ADMINISTRATORS, 4, 5, 7.
Of property of nonresident incompetent, see INSANE PERSONS, 4.
Receiver's sales, see RECEIVERS, 5-7.
For taxes, validity, see TAXATION, 8-10, 12.

1. SALES—BY SAMPLE—BREACH OF WARRANTY—FINDINGS—EVIDENCE—SUFFICIENCY. There is sufficient evidence of breach of warranty as to the quality of apples sold, when it appears that they were warranted to be merchantable and of good quality, that most of them

SALES—CONTINUED.

were found to be infected and were condemned and destroyed by the fruit inspector, and that the vendor was notified of such official action and made no investigation as to the facts; and the fact that the purchaser inspected certain boxes before buying and was satisfied as to the quality, does not preclude a recovery, where it is not shown that he inspected that portion that was condemned. *Jones v. Emerson*..... 33

2. SALES—BREACH OF WARRANTY—EVIDENCE OF EXPERT—COMPETENCY. In an action for breach of warranty on the sale of apples, found upon arrival to be infected and unmerchantable, the testimony of an expert to the effect that if infected upon their arrival they could not have been merchantable at the date of the sale, is competent. *Id*..... 33

3. SALES—REPLEVIN—REMEDY OF VENDOR FOR FRAUD—PURCHASE BY THIRD PARTY—NOTICE—ADVANCEMENT OF FREIGHT CHARGES—CONDITIONAL JUDGMENT. Replevin for lumber sold will lie, where the lumber was sold to a dealer who is hopelessly insolvent and who had no intention of paying for the same, without knowledge on the part of the vendor of such insolvency and fraudulent intent, and where the lumber was resold or turned over by the dealer to another to whom the dealer was indebted and who knew of the dealer's insolvency and fraudulent intent, and who paid nothing thereon except the freight charges and a credit on the indebtedness; but in such case the plaintiff will be compelled to refund the freight charges advanced as a condition for recovery. *Kulzer v. Simonton*..... 587

4. FRAUD — ACTION FOR DAMAGES — FALSE REPRESENTATIONS AS TO MINE—INSPECTION BY VENDEE. One who purchases stock in a mining company is not entitled to rescind the sale for fraudulent representations, where it appears that within a week or two he had made a full investigation of the mine and other properties of the company, expressed himself as satisfied, and purchased more stock and dealt in it, for himself and as agent on commissions at a profit, and did not commence an action for damages for more than a year, at which time the mine had proved unprofitable. *Irby v. Tilsley*..... 211

5. CONTRACTS—WARRANTY—EVIDENCE—ORAL REPRESENTATIONS—CONTRADICTING WRITING. When a written order for the sale of a second-hand threshing outfit was signed and sent to the vendor, containing the express stipulations that the warranty therein did not cover second-hand machinery, and that no verbal agreements would be recognized or allowed by the vendor, the same cannot be contradicted by oral evidence of false representations by the agent of the vendor respecting the character and quality of the machinery or by the agent's oral warranty thereof, where there was no clear and satisfactory evidence that the vendee was overreached and it is admitted that he knew the contents of the writing. *Buffalo Pitts Co. v. Shriner*..... 146

SATISFACTION:

Of claim for death by attorney, see COMPROMISE AND SETTLEMENT, 1.
Of judgment of minors by attorney, see ATTORNEY AND CLIENT, 1; by guardian, see INFANTS, 1.
Of judgment against municipality, see APPEAL AND ERROR, 29, 30; JUDGMENT, 7.
Of mortgage by deed, priority over liens, see MORTGAGES, 6.

SCALPERS:

Validity of statute regulating, see STATUTES, 2.

SECURITY:

See BILLS AND NOTES, 5, 6.

SENTENCE:

On plea of guilty obtained unfairly, vacation, see CRIMINAL LAW, 18.
Review on appeal, see CRIMINAL LAW, 16.

SERVICE:

Of process, see PROCESS, 1, 2.

SETTLEMENT:

Of claim for death by attorney, see COMPROMISE AND SETTLEMENT, 1.

SIDEWALKS:

See MUNICIPAL CORPORATIONS, 25-35.

SIGNATURES:

Proof of genuineness, see RECORDS, 1.
Printing of, as subscription to summons, see TAXATION, 3.

SPECIFIC PERFORMANCE:

Enforcement of contract to furnish water for irrigation, see MANDAMUS, 1.

1. EQUITY—SPECIFIC PERFORMANCE OF PARTNERSHIP AGREEMENT—RELIEF. In an action for the specific performance of a partnership agreement for the joint ownership of premises the legal title to which is held by the defendant, a decree adjudging that the plaintiff be declared the owrer of an undivided half interest in the property on condition that a certain balance be paid to the defendant, although the plaintiff is under no obligation to pay the same, is within the equitable powers of the court, on the principle that having acquired jurisdiction for one purpose, it could maintain it for other purposes necessary to a final determination of the controversy which were germane thereto, and grant any relief to which the parties might be entitled. *Lawrence v. Halverson*..... 534

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 19-26; CRIMINAL LAW, 16.

STATES:

Applications for mandamus in name of, see MANDAMUS, 2.
Legislative power, delegation of, see CONSTITUTIONAL LAW, 5, 6.
Right to fix eight hour day on public works, see CONSTITUTIONAL LAW, 4.

STATUTES:

Commissioners to establish boundaries, see BOUNDARIES, 3.
Construction of acts concerning notice of suit, see LIS PENDENS.
Defining rape, information, see CRIMINAL LAW, 4.
Execution sale of land claimed as homestead, see HOMESTEAD.
Factory act, see MASTER AND SERVANT, 1-7, 11-14, 28, 29, 31.
Foreclosure of tax lien, see TAXATION, 3, 4, 7, 9, 13.
Of limitation, see LIMITATION OF ACTIONS.
Location of fish traps, see FISH, 1.
Partial unconstitutionality, effect as to remainder, see CONSTITUTIONAL LAW, 7.
Regulating compensation of justices of the peace, see JUSTICES OF THE PEACE, 1.
Regulating sale of railway tickets, see CONSTITUTIONAL LAW, 2, 3, 5, 7.
Removing restrictions on Indian lands, effect, see INDIANS, 3.
Repeal by implication, see INSANE PERSONS, 4.
Retroactive effect, see EJECTMENT, 2, 3.
Satisfaction of judgment against municipality, see APPEAL AND ERROR, 29, 30; JUDGMENT, 7; by attorney, see ATTORNEY AND CLIENT, 1; by guardian, see INFANTS, 1.
Statute of frauds, see FRAUDS, STATUTE OF.
Unacknowledged leases, see LANDLORD AND TENANT, 4.
Validity, limiting appellate jurisdiction, see APPEAL AND ERROR, 33.

1. STATUTES—REPEAL. A repeal of a statute by implication is not covered by Const., art. 2, § 19, requiring the subject of the act to be expressed in its title. *Coleman v. Cravens*..... 1

2. STATUTES—TITLE OF ACT—SUFFICIENCY. An act entitled, "An act to prevent fraud upon travelers and prescribing where, how, and by whom railroad tickets shall be sold," etc., is sufficient to embrace provisions prohibiting the business of ticket brokerage except by authorized railroad agents. *In re O'Neill*..... 174

3. STATUTES—AMENDMENT—TITLE—SUFFICIENCY. Const., art. 2, § 37, providing that an act shall not be reversed or amended by mere reference to its title but that the act reviewed must be set forth in full, has no application to the implied repeal of a former law by another on the same subject which is a complete law in itself without mention of the former act. *State v. Bergfeldt*..... 234

STOCK:

Of corporations, see CORPORATIONS, 1-6; proof of value, see Id., 7.
Redemption of stock pledged as security, see ACCOUNT, 3, 4.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1-6.
Claims against insolvent corporation, see RECEIVERS, 10.
Liability on corporation note as indorsers, see BILLS AND NOTES, 1, 2.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

STREETS:

Condemnation for, damages, set EMINENT DOMAIN, 1.
Excavations in, removing lateral support, see ADJOINING LANDOWNERS, 3.
Injuries from defects in, see MUNICIPAL CORPORATIONS, 25-35.
Right of city to, limitations, see ADVERSE POSSESSION, 1.
Vacation by city, see CONSTITUTIONAL LAW, 6; MUNICIPAL CORPORATIONS, 18-24.

SUBROGATION:

Of insurance company, see INSURANCE, 7.

SUBSCRIPTION:

To corporate stock, see CORPORATIONS, 2-6.
Subscribing name to summons, see TAXATION, 3.

SUMMONS:

See PROCESS.
In tax foreclosure, see TAXATION, 1-7.

SUNDAY:

Judicial notice of, see CRIMINAL LAW, 1.
Prohibiting Sunday labor, see CONSTITUTIONAL LAW, 1.

SUPERSEDEAS:

On appeal, see APPEAL AND ERROR, 15-17.

SUPPORT:

Contracts for, see CONTRACTS, 1-3.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURPLUSAGE:

Judgment including parties not bound, effect, see JUDGMENT, 4.

SURPRISE:

Alleged as to trial amendment, see PLEADING, 2.
Ground for new trial, see NEW TRIAL, 2.

SURVEYS:

See BOUNDARIES, 1, 2.

TAXATION:

Excessive tax, validity, amount in controversy, see APPEAL AND ERROR, 4, 33.

Foreclosure, default, vacation, see JUDGMENT, 5.

Jurdisdiction depending on question of validity, see APPEAL AND ERROR, 4.

Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 2.

1. TAXATION — FORECLOSURE OF LIEN — SUMMONS — SUFFICIENCY. A summons in foreclosure of a tax lien is not invalidated by reason of an unnecessary explanation as to what is meant by the date of service, when otherwise in proper form. *Stoll v. Griffith*..... 37

2. SAME—TO WHOM ADDRESSED. A summons in foreclosure of a tax lien addressed to Emil Coulon is sufficient where he appears to have been the owner of the property at the time the same was assessed, although it was assessed to E. Coulon. *Id*..... 37

3. TAXATION — FORECLOSURE OF LIEN — SUMMONS — SUBSCRIPTION. Under Bal. Code, § 4882, the original summons for publication in a tax foreclosure is sufficiently "subscribed" by the attorney for the plaintiff although the signature is printed. *Warner v. Miner*.. 98

4. SAME—NOTICE—SUMMONS BY PUBLICATION—NEWSPAPER PRINTED AND PUBLISHED IN COUNTY—PROOF—SUFFICIENCY. Under Bal. Code, § 4878, requiring the publication of a summons to be made in a newspaper printed and published in the county, service by publication is sufficient where the paper was printed at S. in said county and sent to and distributed at I. in said county, although the proof of publication is to the effect that it was printed and published at I. *Id*..... 98

5. SAME—NEWSPAPER—WHAT IS—EVIDENCE—SUFFICIENCY. A paper eleven by sixteen inches in size, containing four pages of four columns each, filled with general and local advertisements, legal notices, and general and local news, issued regularly each week, with a local circulation of 300 paid subscribers in a town of about 400 people, is a newspaper of general circulation in which the publication of summons is authorized. *Id*..... 98

6. SAME — RESIDENCE OF DEFENDANTS — DUTY OF PLAINTIFFS TO INQUIRE—STATUTE. An affidavit for the publication of a summons stating that two of the defendants are nonresidents and that their addresses are unknown, is sufficient to authorize the publication of a summons, although it was shown that the affiant knew that said defendants had acknowledged a deed before a notary of a certain county in another state, no duty devolving upon him to ascertain the addresses of the defendants by inquiry of such notary. *Warner v. Miner*..... 98

TAXATION—CONTINUED.

7. TAXATION — FORECLOSURE — SUMMONS FOR PUBLICATION — SUFFICIENCY. A summons for publication in a tax foreclosure, requiring the defendant "to appear within sixty days (after the service of this summons exclusive of the first publication of summons), which will be on the 6th day of June, 1901," is not a substantial compliance with Laws 1901, p. 383, requiring the summons to contain a direction to the owner to appear within sixty days after the date of the first publication of the summons exclusive of the said first publication; and the time within which the defendant is required to appear being necessary, the defect is fatal to the validity of the judgment. *Owen v. Owen*..... 642

8. TAXATION—PAYMENT OF PART BY TENANT IN COMMON—TAX SALE—VALIDITY. Where a tenant in common, to whom the whole of certain lands were assessed, pays one-half of the taxes, and there is nothing on the record to show that he intended to pay only upon his half, which had been partitioned to him, the statute authorizing half payments in order to secure time on the balance, a sale of the whole premises for the other half of the taxes, after delinquency, is not void for want of a valid tax upon his interest; and failing to appear and defend the tax foreclosure, he is estopped to raise objection that the tax should have been adjudged to be a lien upon only the part of the tract partitioned to his cotenant. *Moyer v. Foss*..... 130

9. TAXATION—FORECLOSURE—JUDGMENT—FORM—WHAT TO CONTAIN. Under Laws 1899, p. 99, § 18, prescribing the form for a judgment upon the foreclosure of a tax lien, and providing that the court shall order and direct the clerk to make out an order for the sale of the property, a judgment containing an order upon the treasurer to sell the tracts is a sufficient order of sale and a certified copy of the judgment signed by the judge and attested by the clerk is all that is required. *Warner v. Miner*..... 98

10. SAME—DEED—PRESUMPTION OF REGULARITY—IRREGULARITIES IN RETURN OF SALE—EFFECT. The validity of a tax deed is not affected by the recitals of the treasurer's return of sale, where the law does not require or authorize such return but makes the deed *prima facie* evidence that the sale was conducted in the manner provided by law, especially where such return recites that the sale was so conducted, and its other recitals are not necessarily inconsistent therewith. *Stoll v. Griffith*..... 37

11. SAME—TAX TITLE—WHO MAY ACQUIRE—GRANTEE UNDER DEFECTIVE DEED. The purchaser of premises from tenants in common, whose deed may be defective as to part of the grantors, may further assure his title by acquiring a tax title which accrued prior to his ownership of the property, and he is not to be held to have acquired the title in the interest of any of the former owners as tenants in common with him. *Id*..... 37

TAXATION—CONTINUED.

12. SAME—ACTION TO SET ASIDE SALE—TENDER OF TAX. An action cannot be maintained by the owner of premises to set aside a tax sale without first paying or tendering the amount of the tax, penalties, and cost. *Moyer v. Foss*..... 130

13. TAXATION—FORECLOSURE—APPEAL—BOND—TIME FOR FILING. An appeal from an order refusing to vacate a tax foreclosure is governed by the general appeal law and not by the special provisions of the revenue act, Laws 1903, p. 75, § 4, providing the conditions and time for filing an appeal bond upon an appeal from a tax foreclosure judgment; hence the bond need not be served and filed at the time of giving notice of the appeal. *Owen v. Owen*..... 642

TAX TITLES:

Contract to obtain, performance, see VENDOR AND PURCHASER, 7.

TENANCY IN COMMON:

Foreclosure of tax lien, see TAXATION, 8, 11.

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Of mortgage debt as condition for relief from foreclosure, see MORTGAGES, 5.

Of tax for vacation of tax sale, see TAXATION, 12.

TIME:

For applying for certiorari, see CERTIORARI, 1.

For filing bond on appeal, see TAXATION, 13.

For filing claim for damages, see MUNICIPAL CORPORATIONS, 1, 2, 27.

For filing statement of facts, extension, see APPEAL AND ERROR, 26.

TITLE:

See PARTITION, 1.

Color of title, see ADVERSE POSSESSION, 2, 3.

To allotted land upon removal of restrictions, see INDIANS, 3.

To land conveyed by parents for maintenance, see CONTRACTS, 1-3.

To partnership property, decree, see SPECIFIC PERFORMANCE, 1.

Of statutes, sufficiency, see STATUTES, 1-3.

Tax titles, see TAXATION, 10, 11.

Of vendor, failure, see VENDOR AND PURCHASER, 5, 6.

TRIAL:

Breach of warranty, see SALES, 1, 2.

For breach of contract in general, see CONTRACTS.

Condemnation proceedings, assessing damages, see EMINENT DOMAIN, 1.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 8-12.

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Instructions as to: Contributory negligence with respect to fire, see RAILROADS, 1, 2; intending consequences of voluntary acts, see CRIMINAL LAW, 15; improper statements of counsel, see ID., 14; personal injuries, see MASTER AND SERVANT, 29-32; MUNICIPAL CORPORATIONS, 33-35; remodeling building, landlord's liability, see APPEAL AND ERROR, 40; removal of lateral support, see ADJOINING LANDOWNERS, 4.

Law of case, see APPEAL AND ERROR, 44-46.

Misconduct of counsel, see CRIMINAL LAW, 14.

Right to counsel, waiver, see CRIMINAL LAW, 17.

Duty of court to inform accused of rights, see CRIMINAL LAW, 18.

Negligence and contributory negligence of passenger as question for jury, see CARRIERS, 2.

Nonsuit, when properly denied, evidence, see CONTRACTS, 10.

For personal injuries, see MASTER AND SERVANT.

For unlawful detainer of demised premises, see LANDLORD AND TENANT, 6.

Trial amendment, surprise, see PLEADING, 1, 2.

Review of findings and verdicts on appeal, see APPEAL AND ERROR, 40-43; EMINENT DOMAIN, 1.

Separate trials of defendants jointly charged, see CRIMINAL LAW, 10.

Taking drink in public saloon as misconduct of juror, see CRIMINAL LAW, 12, 13.

1. TRIAL—SETTING CAUSE FOR TRIAL—DISCRETION—REQUEST FOR CONTINUANCE. The action of the trial court in setting a cause for trial on a certain day will not be reviewed in the absence of an abuse of discretion, or any application for a continuance. *Brown v. Blaine*..... 287

2. TRIAL—ERRONEOUS STATEMENT OF LAW BY COUNSEL—CORRECTION. Where counsel argue the law to the jury incorrectly stating the same on material points, it is the duty of the court, upon a proper request, to correct the error by proper instructions. *Farnandis v. Great Northern R. Co*..... 486

3. TRIAL—COMMENT ON FACTS. In an action for personal injuries against a town, where the attorney for the defendant, in his argument to the jury, stated that the plaintiff had presented her claim to the town, it is unlawful comment upon the evidence, in violation of Const., art. 4, § 16, for the court, in sustaining the objection to such argument, to state in the presence of the jury that there was no evidence of the presentment to the town of any claim, when in fact there was evidence that a claim, verbal or written, had been presented to the town. *Patten v. Auburn*..... 644

TRIAL—CONTINUED.

4. TRIAL—TAKING CASE FROM JURY—PREPONDERANCE OF EVIDENCE. The rule that the trial court is justified in taking a case from the jury where the testimony so strongly preponderates that it would have been its duty to set aside a verdict in favor of the plaintiff, does not prevail in this state, since here the granting of a new trial rests in the discretion of the trial court and to concede the same power in directing a judgment would practically abrogate trial by jury. *Weir v. Seattle Electric Co*..... 657

5. SAME—NONSUIT—DIRECTING VERDICT—EFFECT. If the court would not be warranted in granting a nonsuit it would not be warranted in directing a verdict for the defendant, there being no substantial difference between the two judgments except that one is *res judicata* and the other is not, unless based upon an affirmative finding.

6. TRIAL—NONSUIT. If there is any sufficient evidence to sustain a verdict for the plaintiff, a nonsuit should be denied. *McCowan v. Northeastern Siberian Co*..... 675

7. TRIAL — PRACTICE — JUDGMENT NON OBSTANTE VEREDICTO — STATUTES—CONSTRUCTION. Under Bal. Code, § 6521, providing that the supreme court may direct the proper judgment to be entered, and § 5056, providing that the trial court shall consider alleged error on motions for a new trial or for judgment notwithstanding a verdict, it is competent for the trial court, after a verdict for the plaintiff, to entertain a motion by the defendant for judgment *non obstante veredicto*, and to grant the same where it appears that the plaintiff has no possible right to recover. *Roe v. Standard Furniture Co*..... 546

8. TRIAL—INSTRUCTIONS AS TO WEIGHT OF EVIDENCE. Where, upon the material point in issue, a witness on one side is contradicted by two witnesses on the other side, it is proper for the court to instruct the jury that the preponderance of the evidence is not necessarily determined by the greater number of witnesses; and it was error to instruct that the weight of the evidence was with the greater number of witnesses and that the testimony of two unimpeached witnesses cannot be disregarded. *McCowan v. Northeastern Siberian Co*..... 675

9. TRIAL—FINDINGS—FORM. Findings of fact and conclusions of law need not be separately stated in equitable or probate proceedings tried without a jury. *In re Farnham's Estate*..... 570

TRUSTS:

Presumption of continuation of trust, see EXECUTORS AND ADMINISTRATORS, 2.

Subsequent entryman as trustee, see PUBLIC LANDS, 3.

UNITED STATES:

Courts, when decisions controlling in state courts, see COURTS, 1, 2.

UNLAWFUL DETAINER:

See LANDLORD AND TENANT, 6.

USER:

Establishment of highway, see HIGHWAYS, 1.

VACATION:

Of appointment of receiver, appealability, see APPEAL AND ERROR, 1.
Of confirmation of receiver's sale, see RECEIVERS, 7.
Foreclosure sale, see MORTGAGES, 5.
Of judgment, excusable neglect, see JUDGMENT, 5, 6.
Of sentence on plea of guilty obtained unfairly, see CRIMINAL LAW, 18.
Of streets, see MUNICIPAL CORPORATIONS, 18-24.
Of tax sale, see TAXATION, 12.

VARIANCE:

See CRIMINAL LAW, 6; EJECTMENT, 1.

VENDOR AND PURCHASER:

See SALES.
Bona fides, recording of deeds, see DEEDS, 2-4; EJECTMENT, 2, 3.
Notice, of unacknowledged mortgage, see MORTGAGES, 1.
Purchase pending action to recover possession, notice, see ADVERSE POSSESSION, 3.
Purchasers pending suit, see LIS PENDENS.
Sale or mortgage by executor, see EXECUTORS AND ADMINISTRATORS, 4-7.

1. VENDOR AND PURCHASER — CONTRACT FOR SALE — CONSTRUCTION — OPTION AND NOT AN AGENCY—RIGHTS OF PURCHASERS. A contract whereby the owner of premises agrees to sell the same amounts to a conditional sale or option, and does not constitute the vendee an agent for the sale of the premises, where it was provided that the vendee was to have six months in which to resell the premises, and deposit $145 per lot, net to the owner, in a bank, less five per cent commission, and where the time was extended from time to time and the owner made deeds to various purchasers of lots resold by said vendee; hence the contracts made by said vendee on receipt of installments of purchase money, without depositing the same in bank and completing his purchase, which was subsequently declared forfeited, are not sufficient to pass any title, or to compel the owner to make conveyances as for sales made by an agent. *Monk v. Duell*..... 403

2. VENDOR AND PURCHASER — CONTRACTS — CONSTRUCTION — CONDITIONAL OR ABSOLUTE SALE. A contract whereby the defendants undertook to redeem the land of another from certain mortgage and judgment liens, furnish him a place to live, pay him an annuity, and

VENDOR AND PURCHASER—CONTINUED.

reconvey a quarter section thereof after full reimbursement for their expenses, amounts to an absolute and not a conditional sale to the defendants, except as to the part to be reconveyed, and that part only is held in trust for the former owner. *Clutter v. Strange*.... 86

3. VENDOR AND PURCHASER—FRAUD—RESCISSION BY VENDORS—EVIDENCE OF FRAUD—SUFFICIENCY. The plaintiffs, people of average business ability, agreed to sell to the defendant, a total stranger to them, who dissuaded them from consulting an attorney, 3,840 acres of land for the sum of $25,000 upon a small cash payment to begin with, and $2,500 annually thereafter. The contract was upon a printed form and contained a provision authorizing the defendant to sell any portion of the property, not less than one-half section at a time, making contracts direct, which the plaintiff agreed to accept as cash payments on the contract of sale. The plaintiffs testified that they refused to agree to any such proposition, and did not know that it was contained in the contract, the defendant having conceded their demands. The contract was drawn up by the defendant and read over to the plaintiffs by him, omitting the said clause, which was part of the printed matter. Subsequently the defendant made a contract of sale of 2,500 acres for $22,500, and demanded that it be accepted as cash. This the plaintiffs at first refused to do, but later, after protests and upon representations by the defendant that it would not in any way release him from making payments as long as they held title to the lands, the plaintiffs indorsed upon the contract a receipt for $22,500, releasing the balance of the land therefrom. *Held*, that the plaintiffs had been overreached by the fraudulent practices of the defendant and a judgment of nonsuit should be reversed and a new trial ordered. *Stone v. Moody*.... 680

4. SAME—RESCISSION BY PURCHASER—BREACH—FRAUD—FAILURE TO KEEP ACCOUNTS—EFFECT. Where the grantees of certain premises undertook to redeem the same from mortgage and other liens, and to reconvey a part, after full reimbursement for their advances out of the rents, issues and profits of the land, the foreclosure of the mortgage in the interest of the grantees for the purpose, as claimed, of perfecting title, will not be presumed fraudulent as to the owner so as to work a forfeiture of the contract, nor will the failure to keep account of the rents, issues and profits have such effect. *Clutter v. Strange*..... 86

5. SAME—FAILURE OF TITLE—EXCUSE FOR PERFORMANCE. Grantees who undertake to recover a portion of the premises conveyed to them, upon reimbursement for advances made, are not freed from their obligation to reconvey by reason of a partial failure of the title of their grantor, where they acquired the title to such part at one-half its market value, which sum, at most, they could claim as an additional indebtedness against the property. *Id*..... 86

VENDOR AND PURCHASER—CONTINUED.

6. VENDOR AND PURCHASER—ATTEMPTED RESCISSION BY VENDEE—DEFECT IN TITLE—FAILURE TO TENDER RECONVEYANCE—LIABILITY TO ASSIGNEE OF VENDOR FOR BALANCE OF PURCHASE PRICE. Where a conveyance of land was made subject to approval of the title by the vendee, in consideration of $500 in cash, $500 to be paid on approving the title, and the balance by the discharge of a debt due from the vendor to the vendee, and pending the approval of the title the vendor assigns the contract for the $500 still due, to a third person, the vendee cannot, on finding the title defective, rescind the contract without tendering a reconveyance; and where rescission was attempted but found impracticable because of the vendor's inability to return the money paid, and the vendee sold the land in an attempt to reimburse himself for the money paid and the previous indebtedness, he affirms the contract, and is liable to the assignee thereof for the balance due on the purchase price (ROOT, J., dissenting). *Parkhurst v. Dickinson*..... 420

7. VENDOR AND PURCHASER—CONTRACTS—PERFORMANCE. A contract of a vendor to further assure the title by the acquisition of a tax title is fully performed by acquiring the same and quitclaiming to the grantee, although the time for taking an appeal from the tax judgment has not yet expired. *Stoll v. Griffith*..... 37

VERDICT:

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Of notice of appointment of receiver, see RECEIVERS, 2.
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Of objections to validity of tax lien, see TAXATION, 8.
Of resolution by stockholders, see RECEIVERS, 10.
Of right to counsel, see CRIMINAL LAW, 17.
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WARRANTY:

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I. IRRIGATION—ORGANIZATION OF DISTRICT—COLLATERAL ATTACK. The organization of an irrigation district cannot be collaterally attacked in a proceeding to determine the priority of the liens of irrigation assessments over a mortgage on the premises assessed. *Purdin v. Washington etc. Inv. Ass'n*..... 395

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